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In the Supreme Court of the United States

UNISYS CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
BOARD OF FINANCE AND REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Pennsylvania imposes a Franchise Tax on the capital stock value of every foreign corporation doing business in the State. The tax base consists of (i) the consolidated net worth of the taxpayer and its worldwide subsidiaries, and (ii) the taxpayer's capitalized average net income (including dividends from subsidiaries). The apportionment formula used to determine Pennsylvania's taxable share of the tax base consists solely of the taxpayer's apportionment factors. No subsidiary apportionment factors are included.

Does the Pennsylvania Franchise Tax violate the Commerce Clause and the Due Process Clause by including the net worth of all subsidiaries and their capitalized dividends in the tax base, while excluding subsidiary factors from the apportionment formula?

RULE 29.6 STATEMENT

Petitioner has no parent corporation. There is no publicly held company that owns 10% or more of petitioner's stock.

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OPINIONS BELOW

The opinion and order of the Supreme Court of Pennsylvania (App. 1a-55a) are reported at 812 A.2d 448 (Pa. 2002). The denial of reargument (App. 163a) is also reported at 812 A.2d 448 (Pa. 2003). The opinion and order of the Commonwealth Court of Pennsylvania (App. 134a-160a) are reported at 726 A.2d 1096 (Pa.Cmwlth. 1999).

JURISDICTION

The order and judgment of the Supreme Court of Pennsylvania were entered on October 25, 2002. Reargument was denied on December 31, 2002. On March 20, 2003, Justice Souter granted petitioner's application for an extension of time until April 30, 2003, within which to file a petition for certiorari. The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl.3, provides: "The Congress shall have Power . . . . [t]o regulate Commerce within foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV, § 1, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The relevant provisions of Pennsylvania's statutes and regulations are set forth at App. 164a-170a.

STATEMENT OF THE CASE

The heart of this case is the dramatic mismatch between (1) a Pennsylvania tax base consisting of the consolidated net worth of the taxpayer and its worldwide subsidiaries, plus the taxpayer's capitalized average net income (including subsidiary dividends), and (2) an apportionment formula that includes only the taxpayer's separate company apportionment factors.

Petitioner believes the mismatch between a tax base with consolidated items and an apportionment formula with separate company factors inevitably distorts taxable value and is thus unconstitutional. The Supreme Court of Pennsylvania divided 4-3 on the issue. App. 30a. Other state court decisions that have considered a similar mismatch issue are in conflict with the decision below and with each other. Final action on approximately 1,000 appeals in Pennsylvania has been deferred pending the ultimate outcome of the instant case.

A. Petitioner's Business

Petitioner, formerly Burroughs Corporation, is a Delaware corporation with its principal office located in Blue Bell, Pennsylvania. It is the successor by merger to Sperry Corporation.[1] Petitioner is a worldwide information technology services and solutions company. It conducts business in Pennsylvania and elsewhere throughout the United States. During the tax years involved, petitioner owned directly or indirectly the stock of more than 100 domestic and foreign subsidiaries that conducted business throughout the United States and in numerous foreign countries. App. 3a, 56a-57a, 61a-120a. Petitioner and its subsidiaries are engaged in a unitary business.

B. Pennsylvania's Taxing Scheme

Pennsylvania imposes a Franchise Tax on the "capital stock value" of a foreign corporation doing business in the State. The tax base is determined by reference to the corporation's (i) consolidated net worth and (ii) capitalized average net income.[2] Consolidated net worth is the combined net

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[1] Further references to petitioner include Sperry Corporation and Burroughs Corporation for the applicable tax years.

[2] For the tax years in issue, the taxing statute defined "capital stock value" as:

> The amount computed pursuant to the following formula: one-half times the sum of the average net income capitalized at the rate of nine and one-half per cent plus seventy-five per cent of net worth, the algebraic equivalent of which is
>
> .5 (average net income/.095 + (.75)(net worth))

72 P.S. § 7601(a); App. 166a.

worth of the taxpayer and all of its subsidiaries;[3] net income includes dividends received from subsidiaries.[4]

One of two elective methods of apportionment is used to arrive at in-state taxable value. The primary method is three-factor apportionment. The apportionment formula calculates the mathematical average of three ratios: Pennsylvania tangible property to tangible property everywhere; Pennsylvania payroll to payroll everywhere; and Pennsylvania sales to sales everywhere. However, only the tangible property, payroll and sales of the taxpayer are included in the formula; no property, payroll or sales of the taxpayer's subsidiaries are given any representation. App. 3a, 5a-7a.[5]

The Franchise Tax is imposed on every foreign corporation engaged in business in Pennsylvania. Any subsidiary so engaged that also has a parent company so engaged will thus have its net worth included in both its parent's Franchise Tax base and its own Franchise Tax base. Yet, its apportionment factors will be utilized only once, in the computation of its own tax.

[3] So far as here pertinent, "net worth" is defined as "the sum of the entity's issued and outstanding capital stock, surplus and undivided profits . . . . In the case of any entity which has investments in the common stock of other corporations, the net worth shall be the consolidated net worth of such entity computed in accordance with generally accepted accounting principles." 72 P.S. § 7601(a); 61 Pa. Code § 155.27(a), (b); App. 167a, 170a.

The purpose of consolidated financial accounting is to reflect the condition of a parent and its subsidiaries as if the group were a single company. Consolidated Financial Statements, Accounting Research Bulletin No. 51, para. 1 (Comm. on Accounting Procedure 1959).

[4] 72 P.S. § 7601(a); 61 Pa. Code § 155.26(a), (b); App. 166a, 169a; *see also Philadelphia Suburban Corp. v. Commonwealth*, 635 A.2d 116, 119-20 (Pa. 1993).

[5] The three-factor formula is set forth in the corporate net income tax provisions and incorporated by reference into the Franchise Tax provisions. 72 P.S. §§ 7401(3)2.(a)(9)(B), 7602(b), 7603; App. 164a-165a, 168a, 169a. The alternative formula uses a single ratio, the value of the taxpayer's taxable assets over the value of all the taxpayer's assets. Intangible taxable assets are situsted to Pennsylvania. A foreign corporation electing the alternative formula is treated as a Pennsylvania corporation. 61 Pa. Code § 151.10.

C. Tax Assessments

The instant case involves tax years ending March 31, 1985, March 31, 1986 and December 31, 1986. App. 135a, 171a-179a. For those years, petitioner computed its Franchise Tax on a separate company basis. It calculated its tax base by reference to its own net worth and average income, but not the net worth of its subsidiaries or any dividends received from subsidiaries. Petitioner elected to apportion its tax base using the three-factor formula that reflected its tangible property, payroll and sales for those years. App. 3a, 57a.

The Pennsylvania Department of Revenue ("Department") increased petitioner's Franchise Tax by including in the tax base both the aggregate net worth of petitioner's 100+ subsidiaries and, on a capitalized basis, any dividends petitioner had received from those subsidiaries. App. 3a-4a, 57a-58a. These additions resulted in a substantial increase in petitioner's tax base for the years in question. No change was made in the single company three-factor apportionment formula that petitioner had utilized.[6] App. 4a, 58a.

D. Proceedings Below

Petitioner brought administrative appeals of its Franchise Tax assessments on various grounds, all of which were rejected by respondent. App. 138a-139a. Petitioner then commenced *de novo* litigation, again arguing, *inter alia,* that the mismatch between a tax base containing significant consolidated ele-

[6] The Department's addition of consolidated elements to the tax base while retaining the separate company apportionment formula increased petitioner's Franchise Tax liability by 90%, 23%, and 21%, respectively, over what the tax would have been for the years in question if fully consolidated apportionment factors had been used. App. 133a. Stipulated data also show the impact of Pennsylvania's taxing scheme on petitioner for the entire period 1984 through 1994. App. 59a-60a, 121a-133a.

ments and an apportionment formula containing only separate company factors violated the Commerce Clause and the Fourteenth Amendment Due Process Clause. App. 139a, 171a-179a. The trial court found no constitutional violation in the Pennsylvania taxing scheme, but directed that certain statutory relief be considered on remand. App. 146a-149a.

On cross-appeals by petitioner (App. 180a-184a) and respondent, the Pennsylvania Supreme Court decided by a 4-3 vote that there was no constitutional violation in the Pennsylvania taxing scheme and that petitioner was entitled to no relief. App. 1a-55a. The majority described the Pennsylvania tax base as a "hybrid" tax base consisting of consolidated elements (the group's combined net worth and subsidiary dividends) and a separate company element (petitioner's capitalized average net income). App. 25a.

The majority acknowledged that "Pennsylvania's scheme for taxation of foreign business franchises may be less than ideal, and absent statutory fairness adjustment, unconstitutional in some applications." App. 29a. It further stated that "the inherent rationality of factor representation cannot be disputed." App. 28a. Nonetheless, the majority held that the tax base/apportionment formula mismatch did not on its face constitute a constitutional violation even though it might yield unconstitutional results. The majority concluded that because petitioner had not offered an appropriate baseline measurement against which to test the taxing scheme for "substantial disparity," App. 23a-24a, 29a-30a, the tax had to be upheld.

Three justices in two dissents concluded that Pennsylvania's taxing scheme is unconstitutional without the need for any showing of substantial disparity. Justice Nigro stated that "[c]ommon sense suggests that this tax base/apportionment factor mismatch renders the taxing scheme fundamentally unfair and, in my view, unconstitutional." App. 32a-33a. Justice Newman, joined by Justice Castille, elaborated:

> Therefore, I would hold that the taxing scheme is unconstitutional as applied to multi-state business enterprises with subsidiaries because it has the potential to tax extra-territorial income. Whether or not the tax base is purely unitary or a hybrid is of no moment; the tax base is comprised of the parent corporation and at least some aspects of the subsidiaries. The entity or entities used to determine that tax base should be the same entity or entities used to determine proper apportionment.

App. 54a. The dissenting justices would have directed respondent to remedy the constitutional violation on remand.

REASONS FOR GRANTING THE PETITION

The instant case squarely presents one of the most fundamental questions affecting state taxation of interstate commerce—whether a clear mismatch between the constituent elements of a tax base and the constituent elements of an apportionment formula produces a fatal defect in the State's taxing scheme.

It is well established that States may not tax value earned outside their borders. *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 164 (1983). It is also well established that, in order to avoid a constitutional violation, a State must ensure "fair apportionment" of the amount it seeks to tax. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Yet, this Court has not provided meaningful guidance as to how the fair apportionment requirement informs the relationship between a tax base and the factors employed to apportion it.

As a consequence, state courts have been left to grapple with the issue on their own. The net result has been conflict, confusion and uncertainty with respect to questions even as fundamental as the one here presented—whether the constitutional requirement of fair apportionment can tolerate a

taxing scheme where the tax base includes the consolidated value of all members of a worldwide corporate group, but the apportionment formula includes only the factors of a single member of the group.

Review of the decision below will enable this Court finally to resolve the conflicting views of various state courts on this fundamental issue and thereby provide the further guidance so badly needed in this area.

I. THE PENNSYLVANIA TAXING SCHEME DOES NOT SATISFY THE CONSTITUTIONAL REQUIREMENT OF FAIR APPORTIONMENT

A. The Elements of Fair Apportionment.

The Commerce Clause and the Due Process Clause require that a tax on interstate commerce must be "fairly apportioned" to the taxpayer's activities in the taxing state. *Complete Auto Transit*, *supra*; *Container*, *supra*. Fair apportionment is necessary to ensure that a State does not "tax value earned outside its borders," *Container Corp.*, *supra*, at 164, or "project the taxing power of the state plainly beyond its borders." *Norfolk & Western Ry. v. State Tax Commission*, 390 U.S. 317, 325 (1968), quoting *Nashville, C. & St.L.R.Co. v. Browning*, 310 U.S. 362, 365 (1940).

To be fair, an apportionment system must be both internally consistent and externally consistent. *Container*, *supra*, at 169. Only external consistency is at issue in the instant case. External consistency requires that the apportionment factors utilized reflect a reasonable sense of how in-state value is generated. *See Container*, *supra*, at 169-170.

States have long used formulary methods of apportionment to determine that portion of the income earned by a multi-jurisdictional enterprise that is fairly attributable to activity within their borders, as well as to determine the appropriate taxable value of property used in multi-jurisdictional

operations. In the context of a tax on value, this Court set forth the basic rule of formulary apportionment with great clarity in *Norfolk & Western Ry., supra:* "Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." 390 U.S. at 325.

If an apportionment formula is constructed in a manner that is rationally related to the tax base, it should generally produce fair apportionment. If the formula is constructed in a manner that is not rationally related to the tax base, it cannot produce fair apportionment except by coincidence.

B. The Defect in the Pennsylvania Taxing Scheme.

Pennsylvania defines its tax base ("capital stock value") as including consolidated net worth.[7] Petitioner's tax base therefore includes the net worth of all 100+ companies in its group, operating throughout the United States and around the world. Yet, the aggregate value of those companies is apportioned to Pennsylvania based solely on the ratio of petitioner's in-state business activity to petitioner's business activity everywhere. Even though the subsidiaries' aggregate net worth is a substantial part of the tax base, the situs of the subsidiaries' business activities is completely ignored for apportionment purposes.

On its face, therefore, the Pennsylvania taxing scheme violates the basic rule of *Norfolk & Western Ry., supra.* It does not rationally determine that portion of the taxpayer's total capital stock value that is fairly connected with Pennsylvania, because it uses the apportionment factors of only a single company to apportion a tax base that includes the value of countless other companies having no presence in Pennsyl-

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[7] Note 3, *supra.*

vania. For that reason, the Pennsylvania taxing scheme does not meet constitutional standards.[8]

One simplified example should illustrate the point:

> Assume Taxpayer has a net worth of $50 and capitalized average net income of $20. Assume Taxpayer is incorporated in Delaware, but has all of its property, payroll and sales in Pennsylvania. Assume Taxpayer also has a subsidiary that is incorporated in New York, has all of its property, payroll and sales in New York, has a net worth of $80 and pays no dividends.

The Pennsylvania tax base of the Taxpayer (total capital stock value) would be $150 (the combination of the Taxpayer's $50 net worth and $20 capitalized average net income, plus the $80 net worth of the New York subsidiary). The Pennsylvania apportionment formula would produce a fraction equal to 1/1, because all of the Taxpayer's property, payroll and sales are in Pennsylvania and 100% of each factor would therefore be in both the numerators and denominators of the apportionment formula. The result would be a tax on 100% of the tax base (i.e., the full $150), even though $80 of the tax base clearly represents out-of-state value.[9]

The reason for the extraterritorial taxation, of course, is that no portion of the subsidiary's property, payroll or sales is represented in the denominators of the Pennsylvania apportionment formula (there could be no inclusion in the numerators because nothing attributable to the subsidiary is present in Pennsylvania). As a result, there is no "apportioning away"

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[8] The inclusion of capitalized subsidiary dividends in the tax base along with consolidated net worth simply exacerbates the problem.

[9] Omitted from the calculations for the sake of simplicity are the 0.75 multiplier applied to consolidated net worth and the 0.5 multiplier applied to the sum of capitalized average net income plus consolidated net worth as so reduced. *See* note 2, *supra*, for a description of the calculations required. Such arithmetic omissions do not in any way affect the point at issue.

from Pennsylvania of the out-of-state portion of the group's combined value.[10]

It may well be that inclusion of the appropriate subsidiary factors in the denominators of the apportionment formula would not produce the precise aggregate value that is properly attributable to Pennsylvania. That would depend on the actual numbers used and the arithmetical computation that would follow. But the absence of *any* factor representation for the subsidiary makes it clear on the face of it that the Pennsylvania statute is flawed.

Notwithstanding the foregoing, the majority below rejected petitioner's argument that the tax base/apportionment formula mismatch was inherently unconstitutional. According to the majority, unconstitutionality could be found only if petitioner were able to show that Pennsylvania's apportionment fraction produced a "substantial disparity" in tax liability compared to that produced by a more appropriate apportionment fraction. App. 23a. Because petitioner's suggested use of fully consolidated factors in the apportionment formula was considered inappropriate, the majority upheld the Pennsylvania taxing scheme.

As *Container* and *Norfolk & Western* both clearly indicate, however, an apportionment formula that does not reflect a reasonable sense of how in-state value is generated does not meet constitutional standards. Surely a state *income* tax scheme that includes in the tax base the combined in-

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[10] In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), this Court described the "apportioning away" consequences produced by subsidiary factor representation: "A necessary concomitant of this [combined apportionment] would be inclusion of the subsidiaries' and affiliates' sales, payroll, and property in the calculation of the apportionment formula . . . . The result, presumably, would be advantageous to appellant, since virtually nothing would be added to the 'Vermont' numerators of the apportionment factors, while there would be substantial increases in the 'everywhere' denominators, resulting in a diminution of the apportionment fraction." 445 U.S. at 441 n.15.

comes of a parent company and all of its worldwide subsidiaries, but which apportions that income to the taxing State based solely on the parent company's apportionment factors, would be unconstitutional on its face. The same must be true of a *value-based* tax such as the Pennsylvania Franchise Tax.

Petitioner recognizes that the Pennsylvania tax base includes both consolidated elements (subsidiary net worth and subsidiary dividends) and separate company elements (the taxpayer's net worth and its capitalized average net income, ex-dividends). That does not change the analysis. A mismatch between such a "hybrid" tax base and a single company apportionment formula is still an indefensible mismatch.

While the Pennsylvania taxing scheme might sometimes favor a particular taxpayer or otherwise produce an acceptable result in a given case, that is also of no consequence because such a result would only occur by coincidence. As stated by Justice Nigro in dissent below:

> Based on the Department's calculations, the only circumstance in which Pennsylvania fairly taxes in-state value is if, by mere fortuity, the percentage of the parent company's business that is conducted in Pennsylvania happens to correspond with the percentage of the unitary enterprise's in-state business activity.

App. 40a, n.10. The mere possibility of such a result certainly cannot validate an otherwise flawed formula.

The Pennsylvania scheme will invariably produce impermissible extraterritorial taxation of any taxpayer such as petitioner, which operates a multi-state and worldwide business enterprise that in the aggregate has relatively limited contact with Pennsylvania. Under the general teachings of this Court, any taxing scheme containing a mismatch of the type found in the Pennsylvania scheme must be considered inherently defective and therefore unconstitutional. Otherwise, corporations such as petitioner would be unacceptably burdened

with the choice of dissolving their subsidiaries worldwide and operating solely through divisions of the parent company in order to avoid unfair apportionment. *See Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 77-78 (1992).

II. STATE COURTS THAT HAVE CONSIDERED THE MISMATCH ISSUE HERE PRESENTED ARE IN CONFLICT

Two state courts have taken a position that conflicts with the decision of the Pennsylvania Supreme Court below. Other state courts have adopted the approach of the court below and have insisted on a showing of "gross distortion" before they are willing to find unfair apportionment even where there is an admitted mismatch between the tax base and the apportionment formula in question.

A. Decisions In Maine and Wisconsin Are In Conflict With the Decision Below.

Both the Supreme Court of Maine and the Court of Appeals of Wisconsin have held, in the context of an income tax, that if the tax base includes subsidiary dividends, an apportionment formula that does not include subsidiary factors is constitutionally flawed because it inevitably results in the taxation of extraterritorial income.

In *Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991), the Maine Supreme Court considered the propriety of including foreign subsidiary dividends in the parent company's tax base while excluding foreign subsidiary factors from the apportionment formula. The court held that even though the apparent distortion in tax liability was only 14.9%, 595 A.2d at 1043, n.6, the obvious mismatch between the tax base and the apportionment formula resulted in a violation of the Due Process Clause requirement that the income taxed must be "rationally related to values connected to the taxing

state." 595 A.2d at 1044. As the court stated: "The ineluctable result is that more of the business activity of the unitary business is attributed to Maine than is the actual case." *Id.* In *E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (Me. 1996), the Maine Supreme Court expressly reaffirmed its position in *Tambrands* on the mismatch issue, 675 A.2d at 89, although it held that the State's revised apportionment formula satisfied constitutional requirements.

In *American Tel. & Tel. Co. v. Wisconsin Dept. of Revenue*, 422 N.W. 2d 629 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988), the Wisconsin Court of Appeals considered the propriety of including subsidiary dividend and interest payments in the parent company's income tax base without including any subsidiary factors in the apportionment formula. The court concluded that using a formula without subsidiary factors "does not reflect a reasonable sense of how A.T. & T.'s income is generated and taxes value earned outside the borders of Wisconsin, contrary to secs. 71.07(2) and 71.07(2)(e), Stats., and the due process and commerce clauses of the United States Constitution." 422 N.W.2d at 550.

Thus, in contrast to the court below, both the Supreme Court of Maine and the Court of Appeals of Wisconsin have recognized that a tax base/apportionment formula mismatch of the type here involved is constitutionally impermissible. *See also Household Fin. Co. v. Director of Div. of Taxation*, 177 A.2d 738 (N.J. 1962), *cert. denied*, 317 U.S. 13 (1962).

Leading commentators support the view of the Maine and Wisconsin courts that a lack of symmetry between the tax base and the apportionment formula in a State's taxing scheme should be sufficient to establish unconstitutionality. *See* Jerome R. Hellerstein and Walter Hellerstein, *State Taxation*, para. 9.15[2] (3d ed. 1998); E. George Rudolph, *The Unitary Business Concept and Affiliated Corporate Groups*, 25 Tax L. Rev. 171, 205 (1970); *see also* Grimshaw & Miller,

Having Your Cake & Eating It Too: State Taxation of Corporate Intangible Income Without Factor Representation, [1996]1 State and Local Tax Lawyer 1.

B. Other State Courts Have Refused To Invalidate a Taxing Scheme Even Though the Tax Base and the Apportionment Formula Are Not Properly Aligned.

Several other state courts have refused to invalidate a taxing scheme even though there is an admitted lack of symmetry between the tax base and the apportionment formula. In a number of these cases, the taxpayer argued that the inclusion of subsidiary royalty payments in the parent company's taxable income required the inclusion of subsidiary factors in the apportionment formula. The courts rejected the argument on the ground that the ultimate result produced under a single-company formula was within the range of acceptability.[11] Like the court below, these courts have typically relied on this Court's statements in *Container*, *supra*, at 170 and 180-81, to the effect that unfair apportionment will not be found unless the taxpayer can establish a "gross distortion" in the result. (The majority below used the term "substantial disparity." App. 23a.)

The "gross distortion" test is traceable to *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931) and *Norfolk & Western Ry.*, *supra*. It is further discussed in *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978). Each of those

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[11] *See, e.g., NCR Corp. v. Comptroller of Treasury*, 544 A.2d 764, 779-81 (Md. 1988); *Random House, Inc. v. Comptroller of Treasury*, 531 A.2d 683 (Md. 1987); *NCR Corp. v. Commissioner of Revenue*, 438 N.W.2d 86 (Minn. 1989), *cert. denied*, 493 U.S. 848 (1989); *Ashland Pipe Line Co. v. Marx*, 623 So.2d 995, 1004 (Miss. 1993); *NCR Corp. v. Taxation & Revenue Dept.*, 856 P.2d 982 (N.M. App. 1993), *cert. denied*, 857 P.2d 788 (N.M. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. South Carolina Tax Comm'n*, 439 S.E.2d 254 (S.C. 1993), *cert. denied*, 512 U.S. 1245 (1994).

three cases involved a taxing scheme where the elements of both the tax base and the apportionment formula were entirely those of a single company. No mismatch issue was presented. Not even *Container* itself, which involved a multinational group of companies, raised the claim of a mismatch between the California tax base (worldwide combined income) and the California apportionment formula (the standard three-factor formula with representation for all companies in the group.) In all of these cases, the question presented was whether the result reached through apportionment represented a gross distortion of the taxpayer's actual business results in the taxing State.

Given the latitude allowed to the States in their use of formulary apportionment, reliance on a "gross distortion" test to show unfair apportionment is appropriate where the taxing scheme is symmetrical, because it is presumed that a symmetrical scheme will ordinarily produce a fair result. But where, as here, the challenged scheme is asymmetrical, there is a threshold question to be answered—whether, in light of the composition of the tax base, the apportionment formula utilized bears a rational relationship, "both on its face and in its application," to values connected with the taxing State. *Norfolk & Western Ry., supra*, at 325. No numerical comparisons are necessary to answer that threshold question. Any scheme with a substantive divergence between the constituent elements of the tax base and the constituent elements of the apportionment formula cannot meet the test.

III. THERE IS A COMPELLING NEED FOR MORE SPECIFIC GUIDANCE FROM THIS COURT ON THE ISSUE HERE PRESENTED

In light of the confusion described above and this Court's disinclination to address the issue, it is not surprising that state courts have continued to search for more specific guid-

ance on the question here presented. Even the majority below decried the situation, as follows:

> It is noteworthy, however, that the United States Supreme Court has not fully developed the contours of permissible apportionment as concerns multi-jurisdictional, affiliated corporations. Moreover, the Supreme Court's overall treatment of the guiding principles has been described as lacking concreteness by commentators as well as by the Court itself. [Footnote omitted.] Of particular relevance here, the Supreme Court has expressly left open questions concerning the necessity of factor representation in apportionment. *See Mobil Oil*, 445 U.S. at 441, n. 15.

App. 18a-19a.

In *Mobil Oil*, *supra*, this Court held that, under unitary business principles, the Commerce Clause and the Due Process Clause were not violated by Vermont's inclusion in Mobil's corporate income tax base of dividends received from foreign subsidiaries. While the majority stated that, as part of its litigation strategy, "[Mobil] has disclaimed any dispute with the accuracy or fairness of Vermont's apportionment formula," 445 U.S. at 434, Justice Stevens in dissent believed that Mobil had disputed the formula. Justice Stevens observed that "[u]nless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated." 445 U.S. at 461 (footnote omitted). Justice Stevens continued, "[e]ither Mobil's worldwide 'petroleum enterprise' . . . is all part of one business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner." *Id.* Because the majority did not directly

address the issue in *Mobil*, its views on the question were not made known.

The only other case decided by this Court involving even a passing reference to the question of subsidiary factor representation appears to be *Container*, *supra*. In that case, this Court upheld California's authority to tax the entire combined income of a worldwide multi-entity unitary business using standard three-factor apportionment. This Court described the California apportionment formula in the following terms:

> California and the other States that have adopted the Uniform Act use a formula—commonly called the "three-factor" formula—which is based, in equal parts, on the proportion of **a unitary business' total payroll, property, and sales which are located in the taxing State** . . . . Indeed, not only has the three-factor formula met our approval, but it has become, for reasons we discuss in more detail *infra*, at 103, something of a benchmark against which other apportionment formulas are judged.

463 U.S. at 170 (emphasis added). Because there was no mismatch between the tax base and the apportionment formula under the California scheme, *Container* had no occasion to address the specific point here at issue. Nevertheless, *Container* implictly suggests that where elements attributable to a group of entities are included in the tax base (the worldwide combined income of a unitary business enterprise), elements attributable to those same entities must also be represented in the apportionment formula (the "total" payroll, property, and sales of the unitary business).

Unfortunately, state courts do not view this aspect of *Container* or the discussion in *Mobil* as providing the clear guidance needed to properly resolve issues such as that here presented. As noted above, some courts, including the ma-

jority below (App. 21a-29a), have chosen to focus exclusively on the "gross distortion" test to resolve such issues. In contrast, the Maine and Wisconsin courts have both found asymmetrical taxing schemes to be unconstitutional without a specific finding of "gross distortion." Three of the seven justices below adopted the Maine-Wisconsin approach.

There can be no doubt that the state courts are in disagreement as to the proper analysis to be applied in a case such as this. The issue has been festering in one form or another for over 20 years.[12] As the majority below indicated, there is a compelling need for further guidance. Review of the decision below would enable this Court finally to resolve the conflict among the States and thereby eliminate the uncertainty that continues to grow with respect to this fundamental and frequently recurring question.

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[12] Since the decision in *Mobil Oil, supra*, this Court has denied certiorari in several cases that have raised the factor representation issue in various contexts. *E.g., Caterpillar Inc. v. New Hampshire Dept. of Revenue*, 741 A.2d 56 (N.H. 1999), *cert. denied*, 529 U.S. 1021 (2000); *Caterpillar Inc. v. Commissioner of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 522 U.S. 1112 (1998); *NCR Corp. v. South Carolina Tax Comm'n, supra.; NCR Corp. v. Taxation & Revenue Dept., supra; NCR Corp. v. Commissioner of Revenue, supra.*

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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April 23, 2003

Appendix A

[J-172-2002]

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 73 MAP 1999

UNISYS CORPORATION, Appellee v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant

CROSS APPEAL OF UNISYS CORP. AT

NO. 76 MAP 1999

Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 151 F.R. 1991 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 74 MAP 1999

UNISYS CORPORATION, Appellee v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant

CROSS APPEAL OF UNISYS CORP. AT

NO. 77 MAP 1999

Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 75 MAP 1999

UNISYS CORPORATION, Appellee v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant

CROSS APPEAL OF UNISYS CORP. AT

NO. 78 MAP 1999

Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 76 MAP 1999
UNISYS CORPORATION, Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 151 F.R. 1991 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 77 MAP 1999
UNISYS CORPORATION, Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 78 MAP 1999
UNISYS CORPORATION, Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

Re-submitted: August 22, 2002

OPINION

MR. JUSTICE SAYLOR Decided: October 25, 2002

These consolidated appeals concern constitutional and statutory challenges to the methodology employed by the Department of Revenue to calculate Pennsylvania franchise tax obligations of an out-of-state corporation conducting business activities in the Commonwealth.

Appendix A

Corollary to the capital stock tax imposed on domestic (Pennsylvania) corporations, the Commonwealth imposes a franchise tax upon foreign (out-of-state) corporations authorized to do business within its borders. In conformance with federal constitutional requirements, the tax is ostensibly designed to reach only value attributable to the conduct of in-state business activity. Nevertheless, the initial tax base is quite broad in that it subsumes measures of value generated by the taxpayer and its subsidiary corporations, both in and out of state. In attempting to adjust this broad tax base to isolate in-state value prior to application of the tax rate, the taxing statute incorporates principles of formulary apportionment. Unlike the methodology utilized to determine the tax base, however, the apportionment formula prescribed by the taxing statute, as interpreted by the Department, does not take into account factors representing in- and out-of-state value generated by taxpayer subsidiaries. Unisys's present challenges are centered upon the absence of factor representation in single-entity, franchise value apportionment.

Unisys is a Delaware corporation with its principal offices in Blue Bell, Pennsylvania, conducting business in all states of the United States; it was formerly named Burroughs Corporation and is the successor by merger to Sperry Corporation.[1] Throughout the tax years in question, Unisys owned, directly or indirectly, the stock of more than one hundred domestic and foreign affiliates doing business in more than one hundred countries. Despite such ownership (and plain requirements of the taxing statute), in its franchise tax returns, Unisys calculated its tax base without reference to value attributable to its subsidiaries. In settling Unisys's franchise tax for the applicable years, however, the Department in-

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[1] Further references to Unisys include Sperry and Burroughs for the applicable tax years.

creased the tax base to include certain measures of out-of-state value. Nevertheless, in adjusting the tax base to arrive at a taxable value, the Department did not incorporate into the apportionment formula any indices of value pertaining to the out-of-state subsidiaries, which, according to Unisys, had the effect of distorting its tax liability (or, more specifically, increasing the taxable value by some forty-five percent). Unisys filed resettlement petitions with the Department, which were denied, then with the Pennsylvania Board of Finance and Revenue (the "Board"). The Board also denied Unisys's petitions, and the company lodged appeals in the Commonwealth Court sitting effectively as a trial court, *see* Pa.R.A.P. 1571, with the present appeals concerning the tax years ending March 31, 1985, and 1986 (Sperry Corporation returns), and December 31, 1986 (Unisys returns). At all stages of the litigation, Unisys contended that the apportionment formula applied by the Department violated the Commerce and Due Process Clauses of the United States Constitution, U.S. Const. art. I, §8, cl. 3;[2] U.S. Const. amend XIV, §1, as well as statutory fair apportionment provisions set forth in Section 401 of the Tax Reform Code of 1971,[3] 72 P.S. §7401(3)2.(a)(18).

Pursuant to the procedure for review of Board determinations, *see* Pa.R.A.P. 1571, the Commonwealth Court considered the appeal on a stipulation submitted by the parties. A divided, *en banc* court determined that the franchise tax imposed was consistent with constitutional precepts, but that Unisys was nevertheless entitled to statutory relief. *See Unisys*

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[2] Although the Commerce Clause does not expressly restrict the states' authority in the area of income/value taxation, the Supreme Court has long relied upon its negative implications as imposing the relevant constraints. *See, e.g., Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80, 115 S. Ct. 1331, 1335-36 (1995) (discussing dormant Commerce Clause jurisprudence generally).

[3] Act of March 4, 1971, P.L. 6 (as amended, 72 P.S. §§7101-10004) (the "Tax Code").

Corp. v. Commonwealth, 726 A.2d 1096, 1103, 1105 (Pa. Cmwlth. 1999). The majority opened its opinion with a detailed overview of the mechanics of the taxing statute applicable to foreign corporations doing business in Pennsylvania. Under Section 601 of the Tax Code, 72 P.S. §7601, the tax base, termed the "capital stock value" of the corporation, is first determined by a statutory formula based upon the corporation's net worth ("the sum of the entity's issued and outstanding capital stock, surplus and undivided profits as per books . . .," 72 P.S. §7601(a)), and average net income ("[t]he sum of the net income or loss for each of the current and immediately preceding four years, divided by five," 72 P.S. §7601(a)). For such purposes, the taxpayer's net worth includes net worth of subsidiaries, *see* 72 P.S. §7601(a) ("In the case of any entity which has investments in other corporations, the net worth shall be the consolidated net worth of such entity[.]").[4] Net income, however, is assessed on a separate-company, unconsolidated basis (exclusive of the net income or loss of subsidiary corporations), although it includes dividends received from subsidiaries. *See* 72 P.S. §7601(a); 61 Pa. Code §155.26(a), (b); *see also Philadelphia Suburban Corp. v. Commonwealth*, 535 Pa. 298, 303-05, 635 A.2d 116, 119-20 (1993). *See generally Unisys*, 726 A.2d at 1098-99. The statute defines capital stock value as the average of seventy-five percent of net worth and capitalized average net income, subject to a fixed deduction.[5]

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[4] The scope of this statutory definition is tempered by several doctrines, including those of multiformity and unrelated assets, *see generally Commonwealth v. ACF Indus., Inc.*, 441 Pa. 129, 134-35, 271 A.2d 273, 276 (1970), which have been crafted to accommodate the salient constitutional principles discussed below.

[5] Specifically, the taxing statute defines "capital stock value" as:

> The amount computed pursuant to the following formula: the product of one-half times the sum of the average net income capitalized at the rate of nine and one-half per cent plus seventy-five per cent of net worth, from

Following calculation of the tax base, one of two elective methods of apportionment is employed to arrive at a taxable value, again, in deference to the constitutional proscription against state taxation of value earned outside the state's borders. The method applicable to foreign corporations per the terms of the Tax Code is known as three-factor apportionment, *see* 72 P.S. §§7602(b), 7401(3)2.(a)(9)(B), 7603.[6] This method compares certain in-state business activities of a taxpayer with all such of its activities, regardless of the location. Specifically, the formula calculates the mathematical average of three ratios: intrastate property to property everywhere; intrastate payroll to payroll everywhere; and intrastate sales to sales everywhere. Therefore, the apportionment fraction equals:

$$\frac{\text{Property in PA}}{\text{Property everywhere}} + \frac{\text{Payroll in PA}}{\text{Payroll everywhere}} + \frac{\text{Sales in PA}}{\text{Sales everywhere}} \div 3 = \text{Apportionment factor}$$

Unisys, 726 A.2d at 1099 (citing 72 P.S. §7602(b)(1)). In the application of this formula, the Commonwealth Court majority emphasized that:

> As consistently interpreted and applied by the Department, the property, payroll and sales figures that comprise the three fractions represent *only the property, payroll and sales of the taxpayer itself, and not of the taxpayer's subsidiaries*. Thus, under this method, while the net worth of and dividends paid by certain sub-

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which product shall be subtracted one hundred twenty-five thousand dollars ($125,000), the algebraic equivalent of which is

(.5 x (average net income/.095 + (.75)
(net worth))) - $125,000

72 P.S. §7601(a). For tax years 1985 and 1986, the final adjustment was to subtract $100,000, rather than the present $125,000. *See* 72 P.S. §7601(a) (superseded).

[6] Per the noted provisions, the three-factor formula is reposited in the corporate net income taxation statute and incorporated by reference into the franchise tax provisions.

> sidiaries of a corporation are included in the corporation's actual value, the property, payroll and sales of those subsidiaries are not considered in the apportionment formula.

Unisys, 726 A.2d at 1099 (emphasis added). After apportionment, the tax due is then computed by applying the millage rate to the taxable value.[7]

Having reviewed the relevant provisions of the Tax Code, the *Unisys* majority proceeded to consider the pertinent constitutional precepts as developed in seminal decisions of the United States Supreme Court, principally, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 103 S. Ct. 2933 (1983), *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425, 100 S. Ct. 1223 (1980), *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 98 S. Ct. 2340 (1978), *Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 88 S. Ct. 995 (1968), and *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 51 S. Ct. 385 (1931).[8] The starting point of these decisions, again, was the limitation arising under the Commerce Clause upon taxation by states of corporate income or

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[7] Thus, for a year in which the tax rate is ten mills, the tax due is represented mathematically by:

actual value x apportionment fraction x .01

Foreign corporations are also afforded the option of calculating capital stock value according to the single-factor formula. The single-factor formula is authorized by the Act of June 22, 1931, P.L. 685, No. 250 (as amended 72 P.S. §1896), and may be employed by foreign corporations pursuant to this Court's decision in *Gilbert Assocs., Inc. v. Commonwealth*, 498 Pa. 514, 516, 447 A.2d 944, 945 (1982). Under that method, the apportionment fraction is based upon the percentage of the corporation's real and tangible personal property located in-state. *See* 72 P.S. §§1894, 1896; 61 Pa. Code §155.10.

[8] While many of the United States Supreme Court decisions in this area concern corporate income tax, the first instances of application of the relevant, unitary business principles occurred in the value tax context. *See Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 779, 112 S. Ct. 2251, 2258 (1992); *Jefferson Lines*, 514 U.S. at 181-83, 115 S. Ct. at 1336-37.

value generated beyond their borders. *See Unisys*, 726 A.2d at 1100. *See generally Container Corp.*, 463 U.S. at 164, 103 S. Ct. at 2939; *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S. Ct. 582, 588 (1989). Upon consideration of the difficulties attendant to the delineation of in-state income or value via geographic or transactional accounting,[9] the Supreme Court has concluded that the Commerce and Due Process Clauses afford the states latitude to include multijurisdictional income/value within a corporation's tax base, provided that certain governing conditions are satisfied. *See Container Corp.*, 463 U.S. at 164-65, 103 S. Ct. at 2940, *cited* in *Unisys*, 726 A.2d at 1100-01. As recognized by the Commonwealth Court, the requirement primarily here at issue is fair apportionment of a unitary business enterprise. *See id.*[10]

This requirement is comprised of two interrelated concepts. First, in order for a state to assess multijurisdictional income/value (including that which is attributable to subsidiary corporations), the Supreme Court has determined that the taxpayer must be part of a unitary business enterprise, assessed primarily according to the degree of functional integration, centralization of management, and economies of scale arising from its inter-entity dynamics. *See Unisys*, 726 A.2d

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[9] *See Container Corp.*, 463 U.S. at 164-65, 103 S. Ct. at 2940 ("The problem with this method is that formal accounting is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise.").

[10] The full criteria presently governing the imposition of state taxes on the instrumentalities of interstate commerce are set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977), and permit such taxation when:

> the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

Id. at 279, 97 S. Ct. at 1079; *see also Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219-20, 100 S. Ct. 2109, 2117-18 (1980) (quoting *Mobil Oil*, 445 U.S. at 436-37, 100 S. Ct. at 1231).

at 1100 (describing a unitary business enterprise as "an enterprise which carries out distinct multijurisdictional activities resulting in ultimate profit or value derived from the entire business operation" (citing *Container Corp.*, 463 U.S. at 165, 103 S. Ct. at 2940)).[11] Second, while a state may therefore take interstate income or value into account in evaluating the tax liability of a unitary business enterprise, it must nevertheless make a sufficient attempt to identify the portion of the total which is fairly attributable to in-state business activity, or, in other words, to apportion the income/value prior to taxation. *See Unisys*, 726 A.2d at 1100-01 ("The functional meaning of [the unitary business enterprise] requirement is that there be some sharing or exchange of value not capable of precise identification or measurement . . . which renders formula apportionment a reasonable method of taxation." (quoting *Container Corp.*, 463 U.S. at 166, 103 S. Ct. at 2933)).[12]

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[11] *See also Allied-Signal*, 504 U.S. at 783, 112 S. Ct. at 2260 (stating that "the constitutional test focuses on functional integration, centralization of management, and economies of scale"); *Container Corp.*, 463 U.S. at 166, 103 S. Ct. at 2941 (recognizing breadth of unitary business principle and that it could apply "not only to vertically integrated enterprises, but also to a series of similar enterprises operating separately in various jurisdictions but linked by common managerial or operational resources that produced economies of scale and transfers of value"). As noted, the parties here agree that Unisys and its subsidiaries function as a unitary business enterprise.

[12] As elaborated by the Supreme Court in *Container Corp.*:

> The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.

Container Corp., 463 U.S. at 164-65, 103 S. Ct. at 2940; *see also Allied-Signal*, 504 U.S. at 783, 112 S. Ct. at 2260; *Mobil Oil*, 445 U.S. at 438, 100 S. Ct. at 1232.

The *Unisys* majority proceeded to discuss the substantial difficulty in apportionment with respect to a corporation conducting business through subsidiaries and in multiple jurisdictions. *See id.* at 1100 (citing *Container Corp.*, 463 U.S. at 164, 103 S. Ct. at 2939 (observing that "in the case of a more-or-less integrated business enterprise operating in more than one State, ... arriving at precise territorial allocations of 'value' is often an elusive goal")); *cf. id.* at 192, 103 S. Ct. at 2954 ("[a]llocating income among various taxing jurisdictions bears some resemblance . . . to slicing a shadow"); *International Harvester Co. v. Evatt*, 329 U.S. 416, 422, 67 S. Ct. 444, 447 (1947) ("this Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of appellant"). Therefore, the Supreme Court has determined that a "'rough approximation rather than precision' is sufficient" to satisfy constitutional demands, so long as the formula used for apportionment appears designed to tax only the value of intrastate business activities. *See id.* at 422, 67 S. Ct. at 447 (quoting *Illinois Central Ry. Co. v. Minnesota*, 309 U.S. 157, 161, 60 S. Ct. 419, 422 (1940)). *See generally Unisys*, 726 A.2d at 1100 (observing that "states must often resort to the use of formulas based upon more readily ascertainable measures of the corporation's activities within and without the state in order to apportion the taxes"). The Commonwealth Court majority thus recognized that, pursuant to Supreme Court precedent, the authority of states to devise various methodologies for assessing intrastate value or income is broad. *See Allied-Signal*, 504 U.S. at 784, 112 S. Ct. at 2261 (explaining that "our cases give States wide latitude to fashion formulae designed to approximate the in-state portion of value produced by a corporation's truly multistate activity"); *Norfolk & W. Ry.*, 390 U.S. at 327, 88 S. Ct. at 1002 (noting that "broad tolerance [is] permitted").

In consideration of the constitutional requirement of fairness in apportionment, the *Unisys* majority noted that the Supreme Court had repeatedly upheld the constitutionality of a three-factor apportionment formula, going so far as to describe it as "something of a benchmark against which other apportionment formulas are judged." *Unisys*, 726 A.2d at 1101 (quoting *Container Corp.*, 463 U.S. at 170, 103 S. Ct. at 2943). The majority distinguished Unisys's arguments, however, as attacking, not the formula itself, but rather, the Department's use in the calculation of payroll, property, and sales data of only the parent corporation. *See Unisys*, 726 A.2d at 1101 ("The essence of Unisys' argument on appeal is that it is fundamentally unfair for the Department to include as income the dividends Unisys received from its subsidiaries and as net worth the value of its investments in the subsidiaries when calculating the actual value of the corporation, but not to include its subsidiaries' property, payroll and sales in the apportionment formula."). In this respect, the *Unisys* majority credited the sound logic underlying factor representation. *See Unisys*, 726 A.2d at 1101 ("Since the purpose of the formula is to apportion the value of the unitary business enterprise among different jurisdictions, it can hardly be subject to dispute that an apportionment formula which includes data from the entire enterprise will yield a more accurate result than a formula based solely upon the parent corporation's operations."). It recognized, nonetheless, that the General Assembly is not necessarily required to implement the most consistent, accurate, or preferred formula, but rather, the question before the court was whether factor representation was constitutionally required. *See id.* The majority acknowledged the position taken by Justice Stevens in his dissent in *Mobil Oil* to the effect that factor representation is in fact mandated by

constitutional principles;[13] however, it also noted that the reasoning applied in a number of state court decisions would support a contrary result, at least insofar as they have rejected a *per se* or bright line test in the traditional due process analysis. *See Unisys*, 726 A.2d at 1101.[14]

The *Unisys* majority then narrowed its inquiry, focusing upon the two-part test crafted by the United States Supreme Court for determining whether an apportionment formula comports with constitutional fairness precepts—in this regard, the Court has indicated that an apportionment scheme will be sustained if it is internally and externally consistent. *See Unisys*, 726 A.2d at 1101-02 (citing *Container Corp.*, 463 U.S. at 169, 103 S. Ct. at 2942). The internal consistency assessment seeks to determine whether, on its face, the apportionment formula is reasonably calculated to reach only the profits earned within the state, or, in other words, that the formula is not inherently arbitrary. *See id.* The Commonwealth Court described external consistency as looking to the practical effect of the formula. *See Unisys*, 726 A.2d at 1102. Under this branch of the analysis, a reviewing court will disallow application of an apportionment scheme if the taxpayer shows that the taxable value attributed to the state "is in fact 'out of all appropriate proportion to the business transacted . . . in that

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[13] The majority quoted Justice Stevens as follows:

> Either Mobil's worldwide "petroleum enterprise," . . . is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used the apportionment methodology artificially to multiply its share of Mobil's 1970 taxable income.

Mobil Oil, 445 U.S. at 461, 100 S. Ct. at 1234 (Stevens, J., dissenting), *cited* in *Unisys*, 726 A.2d at 1101.

[14] The Commonwealth Court cited *E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 88-91 (Me. 1996), *NCR Corp. v. Commissioner of Revenue*, 438 N.W.2d 86, 93 (Minn. 1989), and *American Tel. and Tel. Co. v. Department of Revenue*, 422 N.W.2d 629, 636-37 (Ct.App.1988).

state,' or has 'led to a grossly distorted result.' " *Container Corp.*, 463 U.S. at 170, 103 S. Ct. at 2942 (quoting *Moorman*, 437 U.S. at 274, 98 S. Ct. at 2345, in turn quoting *Hans Rees'*, 283 U.S. at 135, 51 S. Ct. at 389, and *Norfolk & W. Ry.*, 390 U.S. at 326, 88 S. Ct. at 1001); *see also Exxon*, 447 U.S. at 223, 100 S. Ct. at 2118.

The Commonwealth Court majority then characterized Unisys's appeal as predicated upon external consistency and reviewed a series of United States Supreme Court cases concerning that precept. It began by noting that, in *Hans Rees'*, the Supreme Court disapproved taxation under a single-factor method where the foreign corporation demonstrated that, while approximately eighty percent of its income was allocated to North Carolina under the apportionment formula, less than twenty-two percent of the corporation's income actually had its source in the corporation's operations within North Carolina. *See Unisys*, 726 A.2d at 1102 ("Thus, a more than 250% difference between an assessment calculated under a state's apportionment formula and the amount of income actually attributable to a corporation's operations carried on within a state is outside the allowable margin of error, and therefore offends due process." (citing *Hans Rees'*, 283 U.S. at 135-36, 51 S. Ct. at 389-90)). Similarly, the court reviewed the disposition in *Norfolk & W. Ry.*, 390 U.S. at 317, 88 S. Ct. at 995, also observing that a one-hundred sixty-six percent difference in tax due under a state's apportionment formula and under a formula using actual values is also outside the permissible margin of error. *See Unisys*, 726 A.2d at 1102-03. The majority contrasted two decisions of the Supreme Court in which fourteen and forty-eight percent discrepancies asserted by taxpayers were deemed to be constitutionally acceptable. *See id.* at 1103 (citing *Container Corp.*, 463 U.S. at 183-84, 103 S. Ct. at 1949-50; *Moorman*, 437 U.S.

at 280-81, 98 S. Ct. at 2348). Against this background, the *Unisys* majority reasoned as follows:

> Applying the principles of these cases, we conclude that Unisys has not demonstrated a due process violation. Unisys can claim only that were the total property, payroll and sales of the unitary business enterprise included in the fractions of the three-factor formula, its tax due would be approximately 44.5% less than the figure arrived at by the Board in its calculation under the three-factor formula set forth in the Tax Code. We do not believe that a 44.5% disparity between calculations lies outside of the constitutional margin of error delineated by the Supreme Court. A 44.5% disparity is not even remotely close to the 266% and 300% disparities cited by the Court as unconstitutional in *Norfolk & Western Railway* and *Hans Rees' Sons*, and is somewhat less than the variance upheld in *Moorman*.

Unisys, 726 A.2d at 1103.

Having thus concluded its constitutional analysis favorably to the Board, the majority moved to Unisys's contention that it was entitled to statutory equitable relief pursuant to the special apportionment provision set forth in Section 401(3)2.(a)(18) of the Tax Code, 72 P.S. §7401(3)2.(a)(18), which the court described as affording the Department "broad discretion to make appropriate adjustments where any substantial inaccuracy results from application of the allocation and apportionment provisions." *Unisys*, 726 A.2d at 1104. Distinguishing constitutional from statutory unfairness, the majority had little difficulty determining the forty-four and one-half percent variance asserted by Unisys required a remedy under the special apportionment provision. *See id.* ("Even giving due deference to the Department's interpretation of the statute, we simply cannot say that an allocation so far at

variance 'fairly represents the extent of [Unisys's] business activity in this State.' "). In this regard, as it did in its constitutional inquiry, the majority again accepted the benchmark figures supplied by Unisys as its reference and the fact and amount of the percent disparity.[15] In view of the above, the Commonwealth Court remanded to the Board for implementation of statutory relief.

Direct cross-appeals to this Court followed, which raise primarily legal questions, open to this Court's plenary consideration.

Presently, Unisys maintains its argument that, in settling its franchise tax liability for the years in question, the Department ascribed to it a unitary tax base. Unisys does not dispute its status as a unitary business enterprise, or contest Pennsylvania's ability to measure the value of its franchise as such in the first instance. Rather, it rejects the apportionment of an asserted unitary tax base according to factors attributable to the parent corporation only. In this regard, Unisys emphasizes that the justification provided in *Container Corp.* and its progeny for permitting states to aggregate interstate value for purposes of taxation depends integrally upon the out-of-state portion being reasonably "apportioned away" prior to

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[15] The majority took care to emphasize that it was not requiring the inclusion of subsidiaries' data in three-factor formula apportionment in all cases. *See Unisys*, 726 A.2d at 1105 ("The statute gives broad discretion to the Department to use any method which will produce a fair and equitable result, and we will not here limit the method the Department may use[;] [w]e hold only that some form of Subsection (18) relief must be accorded.").

In dissent, Judge Pellegrini expressed his view that, in order for relief to be required under the statutory fair apportionment provisions, there must be an unfair and unconstitutional allocation and apportionment of the foreign corporation's income that does not fairly represent its actual business activity in the State. *See Unisys*, 726 A.2d at 1108 (Pellegrini, J., dissenting). Since Judge Pellegrini agreed with the majority's conclusion that Unisys had failed to establish a constitutional violation, by his reasoning it followed that no statutory relief was due. Judge Doyle also dissented, but without opinion.

arriving at a taxable value, such that the taxing state can ultimately be said to be fairly reaching only value reasonably attributable to business activities within its borders. Where a tax base is determined on a unitary basis, in Unisys's estimation, constitutional fairness principles require that the apportionment fraction must be unitary as well, and therefore, rationally related to, and consistent with, the tax base that it seeks to divide. According to Unisys, a structural "mismatch" between valuation and apportionment methodologies is not only irrational but also produces an inherent and impermissible distortion in segregating value. Unisys asserts that the methodology resulted in an overstatement of the value attributable to its Pennsylvania business activities on the order of some forty-five percent and maintains that the distortion is inimical to the salient constitutional fairness principles regardless of the degree of numerical disparity in tax liability produced. In support of its primary argument, Unisys cites to decisions of the appellate courts in Maine, Wisconsin, and New York. *See Du Pont*, 675 A.2d at 89 (citing *Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039, 1044-45 (Me. 1991), *overruled in part, DuPont*, 675 A.2d at 88-89); *American Tel. & Tel. Co. v. Wisconsin Dep't of Revenue*, 422 N.W.2d 629, 634-36 (Wis. Ct. App. 1988); *People v. Knapp*, 129 N.E. 202, 206 (N.Y. 1920). Further, Unisys claims that the statutory fair apportionment provision requires an identical result, again, consistent with the decisions of other state appellate courts. *See, e.g., Homart Dev. Co. v. Norberg*, 529 A.2d 115, 121 (R.I. 1987); *NCR Corp. v. Comptroller of Treasury*, 544 A.2d 764, 781 (Md. 1988).

The Board disagrees fundamentally with Unisys's position that the franchise tax base assessment is unitary in character. To the contrary, it contends, the aspects of the formula that capture consolidated worth are included merely as a "valu-

ation device" used to measure taxpayers' in-state business activities. In this regard, the Board emphasizes that the average net income component of the tax base assessment is calculated on an unconsolidated basis, with dividends from subsidiaries included only as an appropriate item of income to the taxpayer. Thus, in the first instance, the Board advances its view that factor representation in apportionment is not required in the Pennsylvania scheme even assuming the correctness of Unisys's core argument that consolidated valuation would require it in theory. The Board emphasizes its position that the Department's settlements concerning Unisys's franchise tax liability are consistent with application of the internal and external consistency tests fashioned by the United States Supreme Court, and that Unisys has failed to meet its burden of establishing that the apportionment fractions ascribed do not fairly reflect the extent of Unisys's business activities in the Commonwealth. The Board also posits that the availability of an alternate, elective method for calculating franchise tax liability ameliorates any unfairness that might otherwise be attributed to apportionment via the three-factor method. Finally, the Board maintains that statutory relief is not warranted because the only evidence of "unfairness" in the record stems from Unisys's alternative apportionment formula, which is neither mandated by the statute nor grounded in sound theory. According to the Board, the statutory fair apportionment provision is to be used only in extraordinary circumstances and to avoid constitutional infractions, neither of which is present here.

In considering whether factor representation is required in Pennsylvania franchise tax apportionment, we begin with the question of legislative interpretation, namely, whether the Department's practice of apportioning solely with reference to the parent company's property, payroll, and sales factors is

a reasonable interpretation of the taxing statute. As noted, the Tax Code requires apportionment of the franchise tax base according to factors attributable to the "taxpayer." *See* 72 P.S. §7401(3)2.(a)(10), (12), (13). While the term "taxpayer" is not specifically defined by the statute, its use in context favors the Department's interpretation that it does not include subsidiary corporations. For example, Section 601 of the Tax Code defines "subsidiary corporation" in terms of majority ownership by "the taxpayer corporation." *See* 72 P.S. §7601. The Department's interpretation is also supported by the weight of authority from other jurisdictions considering similar provisions. *See, e.g., NCR Corp. v. Taxation and Revenue Dep't,* 856 P.2d 982, 985 (N.M. Ct. App. 1993) (concluding that "[i]n this case the 'taxpayer' is NCR, not its foreign subsidiaries"); *NCR Corp. v. South Carolina Tax Comm'n,* 402 S.E.2d 666, 669 (S.C. 1991) (same); *NCR Corp. v. Commissioner of Revenue,* 438 N.W.2d 86, 89-90 (Minn. 1989); *NCR Corp. v. Comptroller,* 544 A.2d 764, 777 (Md. 1988). *But see American Tel. & Tel.,* 422 N.W.2d at 632; *Kellogg Co. v. Herrington,* 343 N.W.2d 326, 332 (Neb. 1984).Given the reasonableness of the Department's administrative interpretation, and in keeping with the deference owed it in this regard, *see Jay R. Reynolds, Inc. v. Department of Labor and Indus., Prevailing Wage Appeals Bd.,* 661 A.2d 494, 497 (Pa. Cmwlth. 1995), we will not disturb such interpretation in the absence of sufficient proof of a constitutional violation.

Concerning the constitutional questions presented by Unisys, the Commonwealth Court majority provided a detailed and correct overview of the unitary business enterprise concept and the corresponding requirement of fair apportionment, as summarized above. It is noteworthy, however, that the United States Supreme Court has not fully developed the contours of permissible apportionment as concerns

multijurisdictional, affiliated corporations. Moreover, the Supreme Court's overall treatment of the guiding principles has been described as lacking concreteness by commentators, as well as by the Court itself.[16] Of particular relevance here, the Supreme Court has expressly left open questions concerning the necessity of factor representation in apportionment. *See Mobil Oil*, 445 U.S. at 441 n.15, 100 S. Ct. at 1233 n.15.

The United States Supreme Court, nevertheless, has channeled the inquiry through the application of its internal and external consistency tests. *See Jefferson Lines*, 514 U.S. at 185, 115 S. Ct. at 1338 ("For over a decade now, we have assessed any threat of malapportionment by asking whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well" (citations omitted)); *Goldberg*, 488 U.S. at 261, 109 S. Ct. at 589 ("we determine whether a tax is fairly apportioned by examining whether it is internally and

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[16] *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 315, 112 S. Ct. 1904, 1915 (1992) (stating that "our law in this area is something of a 'quagmire,'" in describing Supreme Court jurisprudence regarding constitutional limitations upon state taxation); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58, 79 S. Ct. 357, 362 (1959) ("application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation"); Ferdinand P. Schoettle, *Big Bucks, Cloudy Thinking: Constitutional Challenges to State Taxes—Illumination from the GATT*, 19 Va. Tax. Rev. 277, 281-82 (Fall 1999) (summarizing the relevant critical commentary). Justices have opined that legislative action may be necessary in order to implement a wholly adequate solution. *See Moorman*, 487 U.S. at 279-80, 98 S. Ct. at 2347-48; *see also ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 352-53, 102 S. Ct. 3103, 3127-28 (1982) (O'Connor, J., dissenting). In this regard, commentators have advocated the use of uniform tax bases and apportionment rules, *see, e.g.*, Kathryn L. Moore, *State and Local Taxation of Interstate and Foreign Commerce: The Second Best Solution*, 42 Wayne L. Rev. 1425, 1467-68 (Spr. 1996), as well as the use of combined accounting procedures. *See generally* Oliver Oldman and Richard D. Pomp, *State Corporate Taxes*, 491 PLI/Tax 291, 323-26 (Mar.-Apr. 2001).

externally consistent"). As recognized by the Commonwealth Court, an apportionment method is considered internally consistent if, in a hypothetical application by all taxing jurisdictions, no more than one hundred percent of the unitary business's income or value is taxed. *See Container Corp.*, 463 U.S. at 169, 103 S. Ct. at 2942 (recognizing that the internal consistency standard is satisfied where the formula, "if applied by every jurisdiction . . . would result in no more than all of the unitary business's income being taxed"). Presently, however, Unisys has not attempted to demonstrate that exclusion of the subsidiaries' income-producing activities in the denominator of Pennsylvania's apportionment formula would result in more than all of its income being taxed.[17] Moreover, the Pennsylvania formula as applied by the Department plainly meets the internal consistency test, since if every taxing jurisdiction applied the formula, no more than all of the value of the unitary business would be taxed, as each item of property, payroll, and sales of the parent corporation repre-

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[17] Rather, as concerns internal consistency, Unisys asserts primarily that the Pennsylvania franchise tax statute, viewed in tandem with the taxing schemes of other jurisdictions, results in multiple taxation. *See* Unisys brief at 39 ("The net worth of all subsidiaries is taxed once as part of the capital stock of the parent and a second time as a part of the capital stock value of those subsidiaries taxable in Pennsylvania or another state."). The internal consistency test, however, is a narrow one focused solely upon the structure of the taxing scheme in question. *See Goldberg*, 488 U.S. at 261, 109 S. Ct. at 589 ("If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on 'the shifting complexities of the tax codes of 49 other States[;]' [i]n any event, to the extent that other States have passed tax statutes which create a risk of multiple taxation, we reach that issue under the external consistency test[.]" (citation omitted)). *See generally Oklahoma Tax Comm'n v. Jefferson Lines Inc.*, 514 U.S. 175, 185, 115 S. Ct. 1331, 1338 (1995) ("This [internal consistency] test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.").

sented in the numerator of the apportionment fraction can be attributable to only one jurisdiction. *Accord Du Pont*, 675 A.2d at 89.

As frequently emphasized in the commentary, the internal consistency test constitutes a minimal check on theoretical weaknesses of apportionment schemes. *See, e.g.*, Moore, *State and Local Taxation*, 42 Wayne L. Rev. at 1453 ("The internal consistency test, in the fair apportionment context, is unexceptional and does little more than serve as a check against blatant multiple taxation in theory." (citation omitted)). The degree to which the Supreme Court intends for external consistency to serve as an additional gauge for theory, as opposed to merely a final check on application of apportionment formulae, is unclear. Certainly, in various instances of its descriptions touching upon the test, the Court has sometimes spoken in terms of theory.[18] The Court has also recognized, however, that "[e]very method of allocation devised involves some degree of arbitrariness." *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303, 114 S. Ct. 2268, 2272 (1994).[19] Indeed, in application, the Court's focus in determining external consistency has fairly regularly been upon result, namely, the degree of disparity between taxation under the state's apportionment scheme versus the outcome

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[18] *See, e.g., Container Corp.*, 463 U.S. at 169, 103 S. Ct. at 2942 (indicating that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated"); *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 561, 85 S. Ct. 1156, 1161 (1965) (observing that the Court "has sought to ensure that the methods [of apportionment] used display a modicum of reasonable relation to corporate activities within the State"); *Norfolk & W. Ry.*, 390 U.S. at 325, 88 S. Ct. at 1001 ("Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing state." (citation omitted)).

[19] *Accord* Daniel N. Shaviro, *State and Local Taxation: The Current Judicial Outlook*, 22 Cap. U. L. Rev. 279, 287 (Spr. 1993) ("[I]t is impossible, from an economic standpoint, to ascribe a definite location to income or value.").

pursuant to some more "neutral" measure or baseline. *See, e.g., Container Corp.*, 463 U.S. at 182-84, 103 S. Ct. at 2949-50; *Moorman*, 437 U.S. at 272-75, 98 S. Ct. at 2344-45. Further, the Supreme Court has also employed definitive terms to indicate that the external consistency test is an outcome-based assessment. *See, e.g., Goldberg*, 488 U.S. at 264, 109 S. Ct. at 590 ("It should not be overlooked . . . that the external consistency test is essentially a practical inquiry."); *Container Corp.*, 463 U.S. at 170, 103 S. Ct. at 2942 (couching the relevant inquiry in terms of taxable value which " 'is in fact out of all appropriate proportion to the business transacted . . . in that state,' or has 'led to a grossly distorted result' " (citations omitted)); *International Harvester*, 329 U.S. at 422-23, 67 S. Ct. at 447 ("Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments."). *See generally Moorman*, 437 U.S. at 273, 98 S. Ct. at 2344 ("despite . . . imprecision, the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula"). Notably, the Commonwealth Court majority's percentage-oriented assessment of external consistency, *see Unisys*, 726 A.2d at 1102-03, represents a fairly typical application.

The challenge facing the Supreme Court has clearly been to allow the states sufficient latitude to surmount the complexities involved in the taxation of multijurisdictional entities while at the same time safeguarding against overreaching by any individual state.[20] We conclude that the balance struck

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[20] In this regard, we are cognizant of the particular difficulty facing the Commonwealth as concerns a value-oriented tax. Many of the cases cited by the parties concern the taxation of corporate income, in which instance the

by the Court restricts the impact of theoretical attacks upon all but the most arbitrary of formulae by generally limiting the inquiry to the relatively minimal test for internal consistency, while preserving the opportunity for taxpayers to more meaningfully challenge apportionment applications by demonstrating a substantial disparity between the tax burden imposed upon them and some reasonable baseline measure. *Accord Container Corp.*, 463 U.S. at 182-83, 103 S. Ct. at 2949 (observing that "[s]ome methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated" but noting that "we have generally upheld the use of such formulas" in the absence of "distortive effect[s]" that were "so outrageous . . . as to require reversal").[21]

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income-based tax base is more readily quantifiable than the value of capital. *See Norfolk & W. Ry.*, 390 U.S. at 324, 88 S. Ct. at 1000 ("Going-concern value, of course, is an elusive concept not susceptible of exact measurement."). In the case of a value tax, therefore, the heightened complexities span both valuation and apportionment. Indeed, to the extent that the *Container Corp.* Court's likening of apportionment of income to slicing a shadow is accurate, *see Container Corp.*, 463 U.S. at 164, 103 S. Ct. at 2939, the apportionment of value might be fairly analogized to slicing vapor.

[21] We acknowledge that some courts would appear to have moved beyond review for internal and external consistency as interpreted above, applying more exacting review of the theoretical underpinnings of apportionment formulae. *See, e.g., Tambrands*, 595 A.2d at 1044.

In dissent, Mr. Justice Nigro appears to adopt such an approach, and, as one indication that the apportionment formula is constitutionally infirm he posits that a corporation's tax liability could, in a hypothetical case, increase even as its in-state factors decrease. *See* Dissenting Opinion, *slip op.* at 10 (Nigro, J.). To support his conclusion of facial unconstitutionality, moreover, he cites to *PPG Industries, Inc. v. Board of Finance and Revenue*, 567 Pa. 580, 790 A.2d 261 (2001) *("PPG II")*, in which the Court found that the manufacturing exemption's headquarters subfactor facially discriminated against interstate commerce. *See* Dissenting Opinion, *slip op.* at 11-12 (Nigro, J.). It should be noted, however, that, pursuant to the headquarters formula, PPG's tax liability would always increase if PPG were to move or expand operations out-of-state. *See PPG Industries, Inc., v. Board of Finance and Revenue*, 567 Pa. 565, 575-76, 790 A.2d 252, 258 (1999) (*"PPG I"*). Thus, the scheme provided a positive incentive for PPG to

In order to provide a predicate for assessment of external consistency, therefore, a taxpayer must establish a proper baseline. In the complex field of constitutional restraints on state taxation of multijurisdictional commerce, the dollar figures presented by the parties for comparison have not been predicated upon any uniform set of parameters from which percentage-based comparisons can be easily drawn across cases. The large discrepancies at issue in *Hans Rees' Sons* and *Norfolk & W. Ry.*, for example, involved the difference between the tax due and that which would have been owed had the taxing authority taken into account the underlying economic realities specific to the unique circumstances of the aggrieved taxpayer. In *Container Corp.*, on the other hand, the relatively small discrepancy at issue arose when the taxpayer chose to compute its tax liability based upon an alternate method that did not reflect the unitary nature of its business. And in *Moorman*, the forty-eight percent discrepancy represented the difference between two admittedly reasonable apportionment schemes tied to different economic indicators. Although it is therefore clear that different measures may be employed, it is appropriate in all cases as a threshold matter to consider the reasonableness of the method or methods presented by the taxpayer to arrive at a baseline measure.

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conduct business within the Commonwealth and penalized the company for expanding such activities out-of-state, thereby running afoul of the prohibition on discrimination against interstate commerce under *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 97 S. Ct. 599 (1977), and its progeny. *See PPG I*, 567 Pa. at 575-76, 790 A.2d at 258. *See generally PPG II*, 567 Pa. at 600, 790 A.2d at 273 (Saylor, J., dissenting). Here, by contrast, there is no similar incentive to shift operations either in-state or out-of-state, and hence, no facial discrimination against interstate commerce. Given the imprecision inherent in virtually any attempt to tax the in-state value of a multi-jurisdictional enterprise, the mere fact that one can propose a hypothetical scenario in which the taxpayer's liability increases while its in-state activities diminish, with no causal connection between the two, is an insufficient basis for a finding of facial unconstitutionality.

Here, Unisys has presented a single approach which treats its tax base as wholly unitary and reflects full factor representation in apportionment—in other words, Unisys has added the full property, payroll, and sales figures of its subsidiary corporations to the denominator of the apportionment fraction. Further, it has presented raw data coupled with bottom-line figures that are detached from the data by the admonition that unquantified adjustments have been made to account for undisclosed exemptions/exclusions.[22] In order to determine the reasonableness of Unisys's approach, it is therefore necessary to consider whether Unisys is correct that the tax base is wholly unitary, such that full factor representation in apportionment will produce an appropriate measure of in-state value. In this regard, the Department argues that such a baseline is unreasonable, since the tax base is not a unitary or consolidated one.

Contrary to the Department's argument, it is apparent that there are unitary aspects to the tax base, as, for example, capital stock value takes into account consolidated net worth. *See* 72 P.S. §7601(a). It is important to observe too, however, as the Department also emphasizes, that the average net income component of value is assessed on an unconsolidated basis prior to capitalization. *See id.*[23] While dividends from subsidiaries are included in taxpayer average net income, and this may be viewed as one measure of consolidated value, the more common and broader measure of value attributable to

[22] This manner of presentation, as well as the absence of additional descriptive data such as the net average income/profits of subsidiary corporations, *see infra*, substantially constrains a reviewing tribunal in terms of its ability to assess fairness in application of the taxing statute other than strictly on the terms dictated by the taxpayer.

[23] Although Pennsylvania thus hybridizes consolidated and unconsolidated factors in determining the franchise tax base, such approach is not wholly aberrant. *See Container Corp.*, 463 U.S. at 168 n.5, 103 S. Ct. at 2942 n.5 (recognizing that "[s]ome States, it should be noted, have adopted a hybrid approach").

subsidiaries, namely, the net income or profits of subsidiaries, is not assessed under the statute. Considering similar circumstances, other jurisdictions have made adjustments to the denominator of the apportionment fraction to ensure that the value imputation due to dividends from subsidiaries is not overstated. For example, the "Detroit formula," applied in some jurisdictions, includes in the denominator only a portion of subsidiary factors based on the ratio of dividends received from subsidiary corporations to the subsidiaries' total net income or profits.[24] As explained by several courts in evaluating a similar paradigm:

> [i]t may not be unreasonable to suggest that inclusion of subsidiaries' dividends in the apportionable income [of NCR] should be balanced by some change in the formula denominator. But the balancing should not be done by including the total property, sales, and payroll values. ... Instead, the denominators should be modified by including only those percentages of the foreign subsidiaries' property, payroll, and sales that generated the foreign subsidiary dividend income taxed by Maryland.

NCR Corp. v. South Carolina Tax Comm'n, 402 S.E.2d 666, 673-74 (S.C. 1991) (quoting *NCR Corp. v. Comptroller of the Treasury*, 544 A.2d 764, 781 (Md. 1988)).[25] Indeed, in some

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[24] *See* 14A Fletcher Cyclopedia Of Private Corp. § 6970 (2000) ("the 'Detroit formula' . . . operates to reduce state's apportioned share of multijurisdictional taxpayer's taxable income base by adding a portion of property, payroll, and sales of dividend-producing foreign subsidiaries, determined by dividing net dividends that parent corporation receives from foreign subsidiaries by those subsidiaries' total net profit, into the denominators of the portions of parent corporation's property, payroll, and sales attributable to in-state value under the Uniform Division of Income for Tax Purposes Act, thus lowering the UDITPA fractional multiplier used against taxpayer's total income and thereby its state taxable income base.").

[25] While the tax at issue in *NCR Corp.* was a corporate income tax, similar overstatement of the contribution of subsidiaries to the parent company may occur in the value tax context due to the inclusion of full subsidiary property, payroll, and sales factors in apportionment in circumstances in which the capitalized divi-

cases, in their attempts to establish a baseline by which to adjudge external consistency, taxpayers have acknowledged the inherent reasonableness of adjusting the apportionment formula to account for retained income or profits of subsidiaries. *See Tambrands*, 595 A.2d at 1042 n.4 ("Tambrands' position is that included in the denominators of the apportionment formula factors should be the same percentage of property, sales and payroll of each Foreign Affiliate as the percentage of net income that each Foreign Affiliate paid in dividends to Tambrands.").[26]

It is also noteworthy that, in the Pennsylvania formula for calculation of the tax base, net worth of the unitary enterprise is reduced by twenty-five percent (which reduction subsumes a reduction of worth attributable to both parent and subsidiary corporations), *see supra* note 5, thus adding substantially to the "margin of error" for purposes of the constitutional assessment. *See Container Corp.*, 463 U.S. at 184, 103 S. Ct. at 2950. Unisys's numbers proffered reflecting full factor representation also fail to take this adjustment into ac-

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dends taken into account in determining the tax base represent merely a portion of the net income or profits of subsidiaries, some of which is retained.

[26] *Accord Container Corp.*, 463 U.S. at 169 n.7, 103 S. Ct. at 2942 n.7 (recognizing as a substantial factor that "the State in that case included *dividends* from the subsidiaries to the parent in its calculation of the parent's apportionable taxable income, but did not include the underlying income of the subsidiaries themselves"); Walter Hellerstein, *State Taxation of Corporate Income from Intangibles: Allied-Signal and Beyond*, 48 Tax. L. Rev. 739, 832 (Fall 1993) ("inclusion of 100% of the subsidiary's factors in the parent's apportionment formula would overstate the subsidiary's contribution to the parent's income if each dollar of payroll, property, and sales was presumed to bear the same relationship to the apportionable income it produced"); *id.* ("there are complicated issues bearing on the proper adjustment of the parent's factors to reflect fairly the subsidiary's contribution to the apportionable tax base that tend to be overlooked in the broad endorsements of the principle of factor representation").

count.[27] Some additional latitude is also due in favor of the Commonwealth in Unisys's particular circumstance, since it maintains its headquarters in Pennsylvania, thereby demonstrating considerable Pennsylvania activity in the management and production of value. *Accord Maxland Dev. Corp. v. Director of Revenue*, 960 S.W.2d 503, 506 (Mo. 1998) ("Income arises partly from transactions in this state when the 'brains'—that plan, design, and direct a specialized operation in other states—are in Missouri." (citation omitted)).

While the inherent rationality of factor representation in apportionment cannot be disputed, neither can the need for a taxpayer, addressing a tax base that incorporates unitary aspects but is substantially hybridized and adjusted, to account for the methodology by which the tax base is calculated in establishing a baseline for purposes of external consistency assessment.

We also consider the Pennsylvania franchise taxation provisions that incorporate fair apportionment principles relevant to the constitutional inquiry. *See* 72 P.S. §7401(3)2.(a)(18). Such provisions establish a statutory mechanism for equitable adjustment to the extent a taxpayer is able to demonstrate that the application of the tax is unconstitutionally (or perhaps otherwise) unfair, thus ameliorating due process concerns within the confines of the taxing scheme itself.[28]

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[27] Indeed, in tax years in which Unisys subsidiaries experienced negative average net income, the statutory adjustment and averaging process required as the means for computing capital stock value resulted in Unisys's pre-apportionment tax base being established at thirty-seven and one-half percent of net worth. (Seventy-five percent of net worth plus zero average net income divided by two equals thirty-seven and one-half percent of net worth).

[28] *Accord S.M.Z. Corp. v. Director, Div. of Taxation*, 473 A.2d 982, 990 (N.J. Super. 1984) (explaining, with respect to New Jersey's analog to Pennsylvania's statutory fair apportionment provisions, "[i]t is undeniably clear that our Legislature enacted Section 8 to serve as a 'safety valve' in cases where the 'allocation factor' determined under Section 6 may produce an unconstitutional result"); *cf.*

Further, regardless of whether statutory fair apportionment precepts sweep beyond the boundaries of constitutional fairness, we conclude that the General Assembly intended for it to be assessed, like external consistency, according to some meaningful reference point established by the taxpayer. Since we find that Unisys has failed to demonstrate the appropriateness of its proffered baseline figures, we also conclude that it has not demonstrated entitlement to relief under Section 401(3)2.(a)(18) of the Tax Code.[29]

In summary, Pennsylvania's scheme for taxation of foreign business franchises may be less than ideal and, absent statutory fairness adjustment, unconstitutional in some applications. Nevertheless, a taxpayer alleging Commerce and

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Moorman, 437 U.S. at 275, 98 S. Ct. at 2345 ("The Iowa statute afforded appellant the opportunity to demonstrate that the single-factor formula produced an arbitrary result[;] [b]ut the record contains no such showing and therefore the [d]irector's assessment is not subject to challenge under the Due Process Clause.").

[29] Mr. Justice Nigro faults the above reasoning for allegedly shifting to the taxpayer the burden to prove the unconstitutionality of the present taxing scheme by comparison with demonstrably reasonable baseline figures for the tax base. *See* Dissenting Opinion, *slip op.* at 13 (Nigro, J.). As noted even by the dissent, however, the burden has always been on the taxpayer to demonstrate unconstitutionality by "clear and cogent evidence." *See id.* at 5. In this regard, we are merely following the U.S. Supreme Court's lead in requiring, as a practical measure, that the taxpayer present the court with a valid and meaningful set of reference calculations against which to measure the alleged distortionate effects of the challenged taxing statute, once it is determined that the apportionment formula passes the internal consistency test. *Compare Container Corp.*, 463 U.S. at 181, 103 S. Ct. at 2948 (rejecting a claim of alleged unconstitutional distortion where the taxpayer's baseline figures were founded upon an accounting method suffering from "basic theoretical weaknesses") *and Moorman*, 437 U.S. at 272, 276, 98 S. Ct. at 2344, 2346 (denying relief in part because taxpayer failed to proffer figures representing the actual profitability of in-state sales subject to the challenged tax) *with Hans Rees'*, 283 U.S. at 134-36, 51 S. Ct. at 389 (providing relief where, although the apportioning methodology was facially sound, the taxpayer adduced convincing reference figures indicating that its income attributable to in-state activities was well below that yielded by the taxing formula) *and Norfolk & W. Ry.*, 390 U.S. at 328, 88 S. Ct. at 1002 (same).

Due Process Clause violations bears a substantial burden to demonstrate by clear and cogent evidence that the state is taxing income earned outside its jurisdiction. *See Container Corp.*, 463 U.S. at 169-70, 103 S. Ct. at 2942-43. Here, Unisys has presented baseline figures predicated solely upon full factor representation of subsidiaries, while failing to establish an adequate correlation between the hybrid, adjusted tax base ascribed to it and factor representation on such terms. Pursuant to the standards crafted by the United States Supreme Court, we conclude, therefore, that Unisys has failed to carry its heavy burden.[30] For much the same reasons, we reach the same result on consideration of the statutory fair apportionment provisions.

Accordingly, we reverse the Commonwealth Court's order and remand for reinstatement of the settlements as approved by the Board. Jurisdiction is relinquished.

Mr. Justice Nigro files a dissenting opinion.

Madame Justice Newman files a dissenting opinion in which Mr. Justice Castille joins.

JUDGMENT ENTERED:
October 25, 2002
/s/ Shirley Bailey
Shirley Bailey, Chief Clerk

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[30] Other courts have reached similar conclusions predicated upon the adequacy of the taxpayers' presentations. For example, one court framed the conclusion as follows:

> [W]e are unable to determine [from the record], in any meaningful way, the extent to which a reasonably structured formula . . . might differ in its results from a formula which excludes that portion of the foreign subsidiary property, payroll, and sales which generated the dividend income. As a further consequence, we cannot tell whether disproportionality [a grossly distorted result] of constitutional proportions is present here.

NCR Corp., 402 S.E.2d at 674 (quoting *NCR Corp.*, 544 A.2d at 781).

[J-172-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
73 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 151 F.R. 1991 Reversing the Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
74 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 201 F.R. 1993 Reversing the Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
75 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 202 F.R. 1993 Reversing the Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
76 MAP 1999
UNISYS CORPORATION, Cross Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Cross Appellee
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 151 F.R. 1991 Reversing the

Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
77 MAP 1999
UNISYS CORPORATION, Cross Appellant v. COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Cross Appellee
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 201 F.R. 1993 Reversing the Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
78 MAP 1999
UNISYS CORPORATION, Cross Appellant v. COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Cross Appellee
Appeal from the Order of the Commonwealth Court entered March 8, 1999, at 202 F.R. 1993 Reversing the Order Dated March 29, 1991 and Remanding to the Department of Finance & Revenue
726 A.2d 1096 (Pa. Commw. 1999)
Resubmitted: August 22, 2002
DISSENTING OPINION
MR. JUSTICE NIGRO Decided: October 25, 2002

In assessing the Pennsylvania franchise tax in the instant case, the Department of Revenue ("Department") added the capital stock value of the parent corporation and more than 100 foreign subsidiary corporations in calculating the tax base. However, the Department then calculated Pennsylvania's share of the tax base, i.e., that portion attributable to business activity in this state, using an apportionment fraction composed of the property, payroll, and sales of only *one* corporation, the parent. Common sense suggests that this tax base/apportionment factor mismatch renders the taxing

scheme fundamentally unfair and, in my view, unconstitutional. Accordingly, I must respectfully dissent.

The Pennsylvania franchise tax was designed to tax out-of-state corporations for the privilege of conducting business within Pennsylvania and is imposed on the capital stock value of a corporation. *See Clairol, Inc. v. Commonwealth, Bd. of Finance & Review*, 518 A.2d 1165 (Pa. 1986).[1] Because a state may not constitutionally tax value earned outside of its borders, the capital stock of a multi-jurisdiction unitary enterprise must be apportioned so that Pennsylvania taxes only that portion of capital stock value attributable to the enterprise's business activities within the state. *See Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983). At the same time, the Due Process and Commerce Clauses of the U.S. Constitution do not allow a state to assess a tax on the interstate activities of an enterprise unless there is a nexus between the interstate activities and the taxing state, and a rational relationship between the portion of the tax base attributed to the taxing state and the intrastate values of the enterprise. *See* U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend XIV, §1; *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Califor-*

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[1] In its simplest algebraic form, the Pennsylvania franchise tax is expressed as: *capital stock value x apportionment factor x statutory tax rate = tax due*. *See* 72 P. S. §§7601-7605. A corporation's capital stock value, i.e., the tax base, is determined by a fixed formula based on: (1) the corporation's net worth, (2) the net worth of any subsidiary of the reporting corporation, and (3) the corporation's average net income, which includes dividends received from its subsidiaries. *See* 72 P.S. §7601(a); 61 Pa. Code §155.26(a). The apportionment factor is computed by means of a statutory apportionment formula that averages three ratios: (1) the corporation's property within Pennsylvania to total property everywhere, (2) the corporation's payroll incurred in Pennsylvania to total payroll incurred everywhere, and (3) the corporation's sales within Pennsylvania to total sales everywhere. *See* 72 P.S. §§7602(b), 7401(3)2.(a)(9)(B), 7603. For the tax years in question, the tax rate was 10 mills. *See id.* §7602.

nia, 528 U.S. 458, 463-64 (2000) (citations omitted).[2] Although a state has wide latitude in fashioning an apportionment formula, a formula will be held invalid where a taxpayer proves by clear and cogent evidence that the income attributed to the state is "out of all appropriate proportion to the business transacted by the [taxpayer] in that state," *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931), that application of the formula has "led to a grossly distorted result" for a taxpayer in a particular case, *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 326 (1968), or that the apportionment scheme is "inherently arbitrary" or its application "produce[s] an unreasonable result," *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) (quoting *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), and citing *Norfolk & Western Ry. Co. v. North Carolina ex rel. Maxwell*, 297 U.S. 682 (1936); *Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 U.S. 271 (1924)).

In the instant case, Unisys reported its average net income on a separate company, unconsolidated basis and there-

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[2] *See also Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 772 (1992) (state may tax a proportionate share of the income of a nondomiciliary corporation that carries out a particular business both inside and outside that state); *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989) (central purpose behind apportionment requirement is to ensure that each state taxes only its fair share of interstate transactions); *Container Corp.*, 463 U.S. at 164, 169 (state may not "tax value outside its borders"; due process requires fair apportionment of unitary business income); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) ("income attributed to the State for tax purposes must be rationally related to values connected with the taxing State").

In essence, the three-factor apportionment formula represents a balance between a state's revenue raising taxation power and the taxpayer's right to be protected from extraterritorial taxation. *See Kraft General Foods, Inc. v. Iowa Dep't of Revenue*, 505 U.S. 71 (1992) (formula serves as mechanism for limiting state tax to the portion of income attributable to business activity within the state); *Container Corp.*, 463 U.S. at 170 (even though the formula does not produce perfectly accurate taxable income figures, "it has become . . . something of a benchmark against which other apportionment formulas are judged").

fore, did not include as income dividends it received from subsidiaries. Unisys likewise reported its net worth on a separate company, unconsolidated basis and apportioned its capital stock value using the statutory three-factor formula. In settling Unisys's franchise tax for the applicable years, the Department increased the amount reported by Unisys as net worth to include the value of Unisys's investments in its subsidiaries and increased the amount reported as average net income by adding the amount of dividends paid to Unisys by its subsidiaries. The Department then calculated Unisys's property, payroll and sales apportionment factors on a separate company basis, that is, the factors included only the property, payroll and sales of Unisys itself and not the property, payroll and sales of its subsidiaries. The Department's methodology in that regard was consistent with its practice of computing the apportionment factor by looking only at the activity of the reporting corporation.[3] On appeal here, Unisys claims that this tax base/apportionment factors "mismatch" offends due process notions of fairness and violates the constitutional requirement that a state tax levied upon a multijurisdictional business be rationally related to values connected to that state.

The majority concedes that "the inherent rationality of factor representation in apportionment cannot be disputed," and recognizes that there is a mismatch in the Department's application of Pennsylvania's apportionment formula because the tax base includes value that is not included in the appor-

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[3] As consistently interpreted and applied by the Department, the property, payroll and sales figures that comprise the three apportionment fractions represent only the property, payroll and sales of the taxpayer itself, and not of the taxpayer's subsidiaries. *See Unisys Corp. v. Commonwealth*, 726 A.2d 1096, 1099 (Pa. Commw. 1999). Thus, under the Department's method, the net worth of and dividends paid by certain subsidiaries of a corporation are included in the corporation's actual value, but the property, payroll and sales of those subsidiaries are *not* considered in the apportionment factor. *See id.*

tionment factors. The majority further states that Pennsylvania's franchise taxation scheme "may be less than ideal" and even "unconstitutional in some applications." Nevertheless, the majority reinstates the Department's settlement of Unisys's franchise tax liability, concluding that Unisys failed to meet its burden of proof. I disagree with this conclusion for several reasons.

In my view, if the majority had applied the unitary business principle to all aspects of Pennsylvania's franchise tax scheme, it would have reached a different result. Instead, the majority discounted the integrated relationship between the value of a unitary business and formula apportionment, and in the process, undermined the underlying foundation of the unitary business principle. *See* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, §9.15(2) (3d ed. 1998); E. George Rudolph, *The Unitary Business Concept and Affiliated Corporate Groups*, 25 Tax. L. Rev. 171, 205 (1970). As I see it, where the theoretical predicate for apportioning dividend income is that the payors of the intangible income are subsidiary corporations engaged in a unitary business with the parent company, it follows as a matter of principle that the subsidiaries' factors must be included in the formula employed to apportion such value.[4] When a formula, such as the one at issue here, fails to recognize the payroll, property, and sales of the subsidiaries that helped generate apportionable value for a unitary enterprise, there ceases to be a rational relationship between the value being taxed and the activities that gave rise to the value and, in my opinion, the inescapable consequence is that unitary value is not apportioned in a constitu-

[4] The rationale for apportioning intangible income when the payor and payee are engaged in a unitary business is that such income is, in substance, the operating income of the unitary enterprise, even though it takes the form of intangible income paid by the subsidiary to its parent. *See Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425, 440-41 (1980).

tional manner.[5] *See* Paul H. Frankel et al., *Factor Representation: Respecting Both Legs of the Unitary Business Principle*, 10 J. Multistate Tax'n 6 (Sept. 2000) (states that include intangible income in taxpayer's apportionable tax base without providing representation in the apportionment formula for the factors that generated the income eviscerate the unitary business principle and transgress constitutional limits on state taxation).

This position is supported by several state courts that have held that an apportionment scheme is unconstitutional when the composition of the apportionment factors is inconsistent with the tax base, and that mismatch distorts the tax base. *See E.I. DuPont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 89 (Me. 1996) (failure to adjust apportionment factors to properly reflect in-state value may result in taxation of extraterritorial value and therefore, violates the fundamental fairness requirements of the Due Process Clause);[6] *American Telephone & Telegraph Co. v. Wisconsin*

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[5] Indeed, the U.S. Supreme Court has endorsed three-factor apportionment formulas "precisely because payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated." *Container Corp.*, 463 U.S. at 170. It is apparent to me that if property, payroll, and sales are the basic ingredients of a fully functioning company, the same factors necessarily represent the basic ingredients of a unitary enterprise composed of multiple companies. However, the majority allows the Department to have it both ways: it includes the value of subsidiaries in the parent's apportionable tax base on the theory that the parent and the subsidiary are engaged in a unitary business, but then ignores the unitary business principle by apportioning that value by factors that reflect *only* the parent's own operations on a separate company basis. *See* Randy M. Grimshaw & Maxwell A. Miller, *Having Your Cake & Eating It Too: State Taxation of Corporate Intangible Income Without Factor Representations*, 1 The State & Local Tax Lawyer 1 (1996).

[6] The Supreme Court of Maine first reached this conclusion in *Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991). As the majority correctly notes, in *DuPont* the Maine Supreme Court abandoned its *internal* consistency analysis set forth in *Tambrands*, but specifically affirmed its prior holding as to the *external* consistency of an apportionment scheme, stating:

Dep't of Revenue, 422 N.W.2d 629, 634-36 (Wis. Ct. App. 1988) (tax base/apportionment factor mismatch inherently unconstitutional under Due Process and Commerce Clauses); *People v. Knapp*, 129 N.E. 202, 206 (N.Y. 1920) (consistency between tax base and apportionment fraction is constitutional requirement); *see also Homart Development Co. v. Norberg*, 529 A.2d 115 (R.I. 1987) (not reaching constitutional issue, but concluding that failure to use factor representation results in inherent and manifest distortion).[7]

These state courts applied the same reasoning expressed by U.S. Supreme Court Justice John Paul Stevens, the only Justice of the U.S. Supreme Court to address the issue Unisys raises here. Addressing a taxing scheme with a base/apportionment factor mismatch similar to the one here, Justice Stevens stated in his dissent in *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425 (1980):

> Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the

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> At the same time, we reaffirm the ultimate conclusion in *Tambrands* that the Assessor's failure to adjust a taxpayer's apportionment factors to reflect the taxpayer's activities both within and without the state of Maine may result in the taxation of extra-territorial value and, therefore, may run afoul of the fairness principles of the Due Process Clause.

DuPont, 675 A.2d at 89. Although the Commonwealth Court below and the Department on appeal here both asserted that the Supreme Court of Maine "abandoned" *Tambrands*, a careful reading of *DuPont* clearly refutes that position.

[7] Although the Commonwealth Court below held that factor representation was not a constitutional requirement for an apportionment formula, it observed:

> Since the purpose of the formula is to apportion the value of the unitary business enterprise among different jurisdictions, it can hardly be subject to dispute that an apportionment formula which includes data from the entire enterprise will yield a more accurate result than a formula based solely upon the parent corporation's operations.

Unisys, 726 A.2d at 1101.

> apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated. Either Mobil's worldwide "petroleum enterprise," is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used its apportionment methodology artificially to multiply its share of Mobil's . . . taxable income perhaps as much as tenfold. In my judgment, the record is clearly sufficient to establish the validity of Mobil's objections to what Vermont has done here.

Id. at 460-61 (Stevens, J., dissenting) (internal citations and footnotes omitted).[8] In my view, Justice Stevens' cogent analysis is equally applicable to the instant case.[9]

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[8] The majority in *Mobil Oil* concluded that the constitutional claim had been waived, and therefore did not address that issue. *Mobil Oil*, 445 U.S. at 441 n.15.

[9] Additionally, two state taxation scholars have expressed sentiments that I find particularly compelling:

> Some state courts have rejected a parent's right to include in its apportionment formula a proportionate share of the subsidiary's factors when payor-payee unity is the predicate for the apportionability of intangible income. They have done so without providing a satisfactory explanation of the basis for the rejection. These courts have instead taken refuge in the doctrine that "rough approximation, not precision" is the standard for unconstitutional apportionment; that the application of an apportionment formula will be struck down only if the taxpayer can prove "by clear and cogent evidence" that the income attributed to the state is "out of all appropriate proportion to the business transacted ... in that State" or has "led to a grossly distorted result"; or that the apportionment in question falls "within the substantial margin of error inherent in any method of attributing income among the components of a unitary business." What these opinions fail to consider, however, is that the "rough approximation" standard is designed to provide states with a "margin of error" in implementing theoretically sound formulas that may on

To demonstrate the weight of that logic as applied to Pennsylvania's scheme, one need only consider the practical application of taxing dividends paid by subsidiaries to the parent company of a unitary enterprise. Where out-of-state income paid to the parent company in the form of dividends increases, the result is an increase in the capital stock value subject to taxation by Pennsylvania, whether or not the unitary enterprise's in-state activities increase. In other words, although the tax base increases, there is no corresponding increase in the denominator of the apportionment formula to account for the out-of-state production of the value. In fact, given this mismatch, an enterprise's Pennsylvania tax liability could increase even while its in-state property, payroll, and sales were *decreasing*.[10] The inherent distortion of such a system is even more apparent where a parent company, such as Unisys, has a large number of subsidiaries.

Unlike the majority, I believe that the systemic deficiency in the Department's application of the apportionment formula will inevitably cause unconstitutional miscalculations of the franchise tax. In my view, the unitary concept, at least to the extent it is applied in computing the tax base, necessarily must carry through to all aspects of the tax computation. Thus, both practical and theoretical consistency, as well as the Due Process and Commerce Clauses, require that some form of factor representation be used in the franchise tax apportionment formula to account for out-of-state value production.

> occasion produce results that fall short of perfection. The standard should not be employed as a safe harbor for analytically indefensible apportionment regimes that happen to produce results that are not "grossly distorted" in a constitutional sense.

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, §9.15[4][a] (3d ed. 1998) (footnotes and citations omitted).

[10] Based on the Department's calculations, the only circumstance in which Pennsylvania fairly taxes in-state value is if, by mere fortuity, the percentage of the parent company's business that is conducted in Pennsylvania happens to correspond with the percentage of the unitary enterprise's in-state business activity.

While Pennsylvania's scheme will no doubt produce constitutional results in some instances, the practical effect of such a scheme on other occasions is the unconstitutional taxation of out-of-state value and impermissible double taxation. *See Norfolk & Western*, 390 U.S. at 327 ("The facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula"). In my judgment, the complete absence of the subsidiaries from the apportionment formula makes it facially apparent that the Pennsylvania statute reaches beyond constitutional limits and taxes value outside its borders. *See Norfolk & Western*, 390 U.S. at 325 (apportionment formula must be rationally related, both on its face and in its application, to values connected with the taxing state); *see also Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984) (a tax that unfairly apportions income from other states is a form of discrimination against interstate commerce, and discrimination can be proved from the face of the tax statute); *cf. Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 99 (1994)) ("State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.' "); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) (quoting Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239, 242 (1960)) (a tax imposed "on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes"); *PPG Industries, Inc. v. Commonwealth, Bd. of Finance & Review*, 790 A.2d 261, 264 (Pa. 2001) (holding manufacturing exception to Pennsylvania's capital stock and franchise taxes unconstitutional because it facially discriminated against interstate commerce).

In reaching its conclusion here, the majority stresses the U.S. Supreme Court's caveat that all apportionment formulas are necessarily imperfect. Such a pronouncement does not, however, cure the constitutional infirmity of Pennsylvania's scheme. Moreover, while it is true that the U.S. Supreme Court has held that a "rough approximation rather than precision" is sufficient to satisfy constitutional demands, to be granted that leeway the formula must first be designed to tax *only* the value of intrastate business activity. *See* International Harvester Co. v. Evatt, 329 U.S. 416, 421-22 (1947) (quoting *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940)); *see also* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, §9.15[4][a] (3d ed. 1998) ("rough approximation" standard is designed to provide states with a "margin of error" in implementing *theoretically sound formulas*). As I see it, Pennsylvania's mismatched apportionment formula is not designed to tax only in-state activity, and the theoretically unsound taxation scheme is therefore unconstitutional on its face.

The majority ultimately rejects Unisys's claim that the apportionment scheme is unconstitutional on its face because Unisys used what the majority considers unreasonable methods in calculating the tax base for comparison to the Department's methodology.[11] In so concluding, the majority states that Unisys "presented baseline figures predicated solely upon full factor representation of subsidiaries, while failing to establish an adequate correlation between the hybrid, adjusted

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[11] As discussed in the majority opinion, the U.S. Supreme Court has addressed challenges to apportionment formulas using percentage comparisons. However, those cases are irrelevant in the sense of numerical comparison because none dealt with an inconsistency between the tax base and an apportionment formula like in the instant case. Moreover, in my view, when a taxing scheme violates the underlying principle of three factor formulation, i.e., fair apportionment, requiring proof of gross distortion from that formula is nonsensical.

tax base ascribed to it and factor representation on such terms." [12] I disagree with the majority's analysis in dismissing Unisys's claim.

The "reasonableness" test the majority applies to Unisys's baseline figures has no precedential basis and, in my view, its application imposes an additional burden on a taxpayer challenging the constitutionality of a tax apportionment scheme and grants the government too much leeway in assessing the franchise tax. Under the majority's new test, the Department can impose a franchise tax using virtually any apportionment formulation, unless and until a taxpayer comes forward with a taxing scheme that meets not only the majority's reasonableness threshold, but also well-established constitutional requirements. Thus, the majority essentially relieves the Department of its primary responsibility for imposing taxes in a constitutional manner, *see Container Corp.*, 463 U.S. at 164; *Hunt-Wesson*, 528 U.S. at 463-64, and creates a bright-line rule requiring precision from taxpayers in an area of tax law in which the majority concludes it is impossible for the Department to be precise. I simply cannot agree with this shifting of the burden onto Unisys to formulate a constitutionally valid system of taxation to compare with the Department's facially unconstitutional system.

Moreover, in my estimation, the fact that Unisys calculated its franchise tax liability with full factor representation while failing to compensate for the "hybrid" nature of the

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[12] Importantly, there is no evidence, or even any allegation, that Unisys presented misleading, inaccurate, or patently false numbers. Rather, the majority concludes that Unisys failed to provide a "proper baseline" in terms of the assets it included in its calculation of capital stock value and, due to the unreasonableness of its calculations, there was no legitimate calculations with which to compare the Department's methodology.

I would also note that the calculations provided by Unisys were part of the stipulations of fact that the parties submitted for administrative and judicial review of the Department's settlement of the franchise tax assessments in this case.

franchise tax base is not necessarily fatal to its entire claim. Given the facial inadequacy of the Department's methodology, Unisys's failure to advance a perfect taxation scheme is not dispositive of the constitutional inquiry at issue here. *Cf. International Harvester Co. v. Dep't of Treasury,* 322 U.S. 340, 343 (1944) (Rutledge, J., concurring in part and dissenting in part) ("If there is a want of due process to sustain" a tax, "by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue' "). Because I would find the Department's application of the franchise tax statute unconstitutional, the only remaining consideration on remand should be, in my mind, whether the Department should implement full factor representation or some hybrid form of factor representation.

I also believe the majority erred in giving substantial weight to Unisys's actual franchise tax liability in addressing its constitutional claim. For example, the majority discredits Unisys's methodology due to its failure to account for the statutory 25% reduction in the net worth of the unitary enterprise when calculating capital stock value under the franchise tax statute. *See* 72 P.S. §7601(a). While the 25% reduction ultimately reduces the tax due, I believe the majority overstates its relevance here because the capital stock value formula set forth in §7601(a) was merely the legislature's method of establishing the proper *tax base,* and the 25% reduction of the entire tax base does not impact the calculation of a constitutionally valid *apportionment fraction.* I am also puzzled by the majority's reliance on the fact that Unisys's subsidiaries experienced negative average net income in certain tax years.[13] The General Assembly concluded that one of the relevant

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[13] Under the statutory formula, yearly net losses are included in calculating book value, but the five-year average of net income *cannot* be less than zero.

factors in determining capital stock value is net income, *see id.*, a determination which necessarily requires accounting for a company's costs, operating expenses, and potentially, losses. Irrespective of profitability, under the taxing statute a company incurs franchise tax liability based on the average of net income *and* net worth. *See id.* As such, the fact that a subsidiary incurs a net loss does not necessarily skew the apportionment of value.

Furthermore, I do not agree with the majority that the statutory provision of exemptions, deductions and adjustments for determining the tax base creates a "margin of error" for a constitutional assessment of apportionment under the Due Process and Commerce Clauses. The whole purpose of the apportionment formula is to identify in-state commerce and not, as the majority seems to suggest, to simply reduce the tax burden to a level that in all likelihood does not overstep constitutional bounds. Thus, the proper inquiry is whether the apportioned tax base fairly represents the in-state business activity of a taxpayer and not whether the actual dollar amount of the assessed tax adequately represents in-state activity irrespective of the constitutionality of the apportionment factor. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984) (where tax has differential impact on in-state and out-of-state activities, the determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened); *cf. Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977) (discriminatory character of the challenged provisions was demonstrated by the fact that they "foreclose tax-neutral decisions" about where to transact business).

Based on the foregoing analysis, I would hold that factor representation is constitutionally required when taxing a multi-state unitary business, and that Unisys met its burden

of showing by clear and cogent evidence that the Department's application of Pennsylvania's franchise tax apportionment scheme violates the Due Process and Commerce Clauses of the U.S. Constitution.[14]

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[14] While the Commonwealth would be left with the unenviable task of producing a specific apportionment formula, I would conclude that if value generated by foreign subsidiaries is used to calculate the capital stock value of a unitary enterprise, there must be some type of factor representation in the apportionment formula in order to calculate a constitutionally fair franchise tax on the in-state business activities of a multi-jurisdictional enterprise. Given this conclusion, I would not reach the issue of whether Unisys was entitled to relief under the statutory fair apportionment provisions set forth in 72 P.S. §7401(3)2.(a)(18).

[J-172-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 73 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP. AT
NO. 76 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 151 F.R. 1991 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue
No. 74 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP. AT
NO. 77 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue
No. 75 MAP 1999
UNISYS CORPORATION, Appellee v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP. AT
NO. 78 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 77 MAP 1999
UNISYS CORPORATION, Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue
No. 78 MAP 1999
UNISYS CORPORATION, Appellant v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue
Re-submitted: August 22, 2002
DISSENTING OPINION
MADAME JUSTICE NEWMAN
Decided: October 25, 2002

I respectfully dissent. The taxing scheme employed by the Department of Revenue (Department) is unconstitutional as applied to multi-state business enterprises with subsidiaries, such as Unisys Corporation (Unisys), because there is no rational relationship between the income attributable to this Commonwealth for tax purposes and the activities giving rise to that income within the Commonwealth.

The United States Constitution limits the authority of states to tax businesses that operate both within and without their confines. "Under both the Due Process and the Commerce Clauses . . . a state may not, when imposing an income-based tax, tax value earned outside its borders." *Container Corp. of America v. Franchise Tax Board,* 463 U.S.

159, 164 (1983) (internal quotation omitted). The Constitution does not "allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a minimal connection or nexus between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Id.* at 165-166 (internal quotations omitted).

I recognize that it is not possible to construct a formula that exactly computes the portion of a business conducted within a specific jurisdiction. *International Harvester Co. v. Evatt*, 329 U.S. 416, 421 (1947). "[T]he States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted . . . in that State,' or has 'led to a grossly distorted result.' " *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) (quoting *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931) and *Norfolk & Western Ry. Co. v. Missouri State Tax Commission*, 390 U.S. 317, 326 (1968)).

Nevertheless, a state seeking to apportion the income of a multi-jurisdictional business must do so fairly, which necessitates that the tax be both internally and externally consistent. *Container Corp.*, 463 U.S. 159. Internal consistency requires that "the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." *Id.* at 169. "This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as

compared with commerce intrastate." *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). "A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." *Id.*

External consistency requires that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp.*, 463 U.S. at 169. "External consistency . . . looks not to the logical consequences of cloning [the internal consistency test], but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Oklahoma Tax Commission*, 514 U.S. at 185. To demonstrate external inconsistency, the taxpayer must demonstrate that the income attributed to the State is disproportionate to the business transacted in the State or has led to a grossly distorted result. *See Moorman Mfg., supra.*

In the case at bar, pursuant to Section 602(b) of the Pennsylvania Tax Reform Code of 1971,[1] the Commonwealth imposes a Franchise Tax on out-of-state corporations to the extent that they do business within Pennsylvania. The formula for computing the tax is comprised of two components: (1) Actual Value; and (2) an Apportionment Factor. Actual value for the years at issue here was calculated by averaging the capitalized five year average net income with seventy-five percent (75%) of the net worth and subtracting from that

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[1] Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7602(b).

figure a one-hundred thousand dollar ($100,000.00) deductible. Net worth of a parent company such as Unisys includes the value of any common stock the corporation owns in other entities, such as subsidiaries, and dividends received from its stock ownership of those subsidiaries. 61 Pa. Code §115.27(a) and (b). The Apportionment Factor is determined by calculating the percentages of the corporation's property, payroll, and sales in the Commonwealth. The value of the corporation's property within the Commonwealth is divided by the value of the corporation's property everywhere to ascertain the percentage of property within the Commonwealth. 72 P.S. §7602(b)(1). The same method is employed to determine the percentages of payroll and sales within the Commonwealth. The Apportionment Factor is equal to the average of these three percentages. The Department then multiplies Actual Value by the Apportionment Factor, and that number by 10 mills to arrive at the Franchise Tax due.

The Department calculates the Apportionment Factor using only the property, payroll, and sales of the parent taxpayer corporation, in this case, Unisys itself, and not of the parent taxpayer corporation's subsidiaries. However, the Department computes Actual Value using the net worth and dividends not only of the parent taxpayer corporation, but also of its subsidiaries. Thus, while the net worth of the parent taxpayer corporation's holdings in a subsidiary and any dividends paid to the parent taxpayer corporation by the subsidiary are included in Actual Value, the property, payroll, and sales of those subsidiaries are not included in the calculation to determine the Apportionment Factor. As the majority recognizes, "[u]nlike the methodology utilized to determine the tax base . . . the apportionment formula prescribed by the taxing statute, as interpreted by the Department, does not take into account factors representing out-of-state value gen-

erated by taxpayer subsidiaries." *Majority Opinion*, slip op. at 3.

I agree that the taxing scheme at issue here is internally consistent. It is well settled that a three-factor apportionment method, such as the one employed here, is constitutionally acceptable. *See Container Corp*, 463 U.S. at 165; *Butler Bros. v. McColgan*, 315 U.S. 501, 505 (1942) ("We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. [T]hese factors may properly be deemed to reflect the relative contribution of the activities in the various states to the production of the total unitary income, so as to allocate to [one state] its just proportion of the profits earned by [taxpayer] from [the] unitary business"). If each jurisdiction calculated Actual Value and the apportionment factor in the same manner as does the Department, the aggregate apportionment factor would equal one hundred percent (100%) as each item of property, payroll, and sales must, by definition, be attributed to one and only one jurisdiction. Thus, all jurisdictions, *in toto*, would tax no more nor no less than one hundred percent (100%) of the Actual Value of Unisys and its subsidiaries. *See E.I. DuPont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 89 (Me. 1996), *overruling Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991) (*Tambrands* held that a taxing scheme analogous to the one at issue here failed the internal consistency test, but *DuPont* rejected that analysis. *DuPont* held that the *Tambrands* scheme was internally consistent but that the taxing body's failure to adjust the "apportionment factors to reflect the taxpayer's activities both within and without the state . . . may result in the taxation of extra-territorial value and, therefore, may run afoul of the fairness principles of the Due Process Clause").

While the taxing scheme employed by the Department in the case *sub judice* is internally consistent, it is nonetheless constitutionally infirm because it is not externally consistent. In *Mobil Oil Corporation v. Commission of Taxes of Vermont*, 445 U.S. 425 (1980), the United States Supreme Court was faced with a taxing scheme that did not include in the calculation of the apportionment factor the property, payroll, and sales of Mobil Oil's subsidiaries, even though the tax was imposed on the value of Mobil Oil and dividends it received from its subsidiaries. A majority of the justices of the United States Supreme Court deemed the issue with which we are presently faced waived and, accordingly, refused to address it. Justice Stevens filed a separate dissenting opinion, in which he concluded that "[u]nless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the . . . tax base will inevitably cause Mobil's Vermont income to be overstated." *Id.* at 461 (Stevens, J., dissenting). Justice Stevens reasoned that "[e]ither Mobil's worldwide petroleum enterprise is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used its apportionment methodology to multiply its share of Mobil's 1970 taxable income." *Id.*

The same concerns are implicated here. The Commonwealth of Pennsylvania has the constitutional prerogative to tax Unisys for its income fairly attributable to its instate activities. This extends to income derived from subsidiaries. However, when determining the percentage of business that the taxpayer corporation conducts in Pennsylvania, fairness and external consistency mandate that the same entities used to determine Actual Value are used to calculate apportion-

ment. Assume, *arguendo,* that the Actual Value of Unisys is $100 and the actual combined value of Unisys' subsidiaries attributable to the Actual Value of Unisys pursuant to the taxing scheme is $400. Now assume that Unisys conducts 80% of its business within the Commonwealth and that the subsidiaries conduct 10% of their business within the Commonwealth. Pursuant to the Pennsylvania taxing scheme, the Actual Value of the taxable corporation would be $500 and the apportionment factor would be 80% (percentage of business Unisys itself conducts in-state). Thus, Unisys would be liable for tax on $400, even though only $120 of its business is attributable to Pennsylvania (80% of $100 + 10% of $400). In fact, this taxing scheme is only externally consistent when the average percentage of property, payroll, and sales in-state for the parent taxpayer corporation is equal to the average percentage of property, payroll, and sales in-state for the combined subsidiaries.

Therefore, I would hold that the taxing scheme is unconstitutional as applied to multi-state business enterprises with subsidiaries because it has the potential to tax extra-territorial income. Whether or not the tax base is purely unitary or a hybrid is of no moment; the tax base is comprised of the parent corporation and at least some aspects of the subsidiaries. The entity or entities used to determine that tax base should be the same entity or entities used to determine proper apportionment. Had the denominator of the apportionment formula included a part of the subsidiaries property, payroll, and sales reasonably designed to balance out the inclusion of subsidiary factors in the tax base, that would be a different question. In this case, however, the Department makes no such attempt at fair apportionment.

I further disagree with the majority that Unisys has failed to demonstrate by clear and cogent evidence that the Com-

monwealth is taxing income earned extra-territorially. The majority would put the burden on the taxpayer to devise a reasonable apportionment formula and show how that formula differs from the one actually utilized by the Department. I believe that the burden on the taxpayer is to show: (1) that the current scheme has the potential to impose a tax that is not in reasonable proportion to the business activities conducted by the taxpayer in the Commonwealth; and (2) that the tax imposed in this case is unfair.

Unisys has clearly and cogently established both that the current scheme has the potential to impose a tax that is not in reasonable proportion to its in-state business activities and that the tax imposed on Unisys is unfair. Thus, the taxing scheme is constitutionally infirm as applied to multi-jurisdictional businesses with subsidiaries. The inclusion of aspects of the earnings of the subsidiaries in the actual value of the parent taxpayer corporation without an attendant inclusion of aspects of the property, payroll, and sales of the subsidiaries in the calculation of the apportionment factor renders the relationship between the tax base and the parent taxpayer corporation's business activities conducted within the state unreasonable.

Mr. Justice Castille joins in this dissenting opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 151 F.R. 1991; No. 201 F.R. 1993; No. 202 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
STIPULATION OF FACTS

Kevin A. Moury, Esquire, Deputy Attorney General, counsel for the Commonwealth of Pennsylvania, and Joseph C. Bright, Esquire, counsel for Unisys Corporation hereby stipulate for the purposes of this appeal that the following facts are true and correct; any documents attached hereto are true and correct copies of the originals; and said facts and documents are admitted into evidence, subject to the right of any party to object to the relevancy or probative value to be given to any such item. This Stipulation does not preclude inclusion into the record of such other facts or documents as the parties shall agree upon or the Court shall direct upon timely and appropriate application of any party.

1. Unisys Corporation ("Unisys") is a Delaware Corporation with its principal office located at Township Line and Union Meeting Roads in Blue Bell, Pennsylvania.

2. Unisys, formerly named Burroughs Corporation, is the successor by merger to Sperry Corporation. Further references to Unisys include Sperry Corporation and Burroughs Corporation for the applicable tax years.

3. Unisys is qualified and does business in Pennsylvania, all other states of the United States, and the District of Columbia.

4. Unisys owned directly or indirectly the stock of more than 100 domestic and foreign subsidiaries doing business in more than 100 countries around the world during the years 1984 through 1994. Certain Unisys subsidiaries were quali-

fied and were doing business in Pennsylvania during the years 1984 through 1994.

5. Unisys filed timely Pennsylvania Franchise Tax returns for the years 1984 through 1994. For certain years, Unisys reported its average net income on a separate company, unconsolidated basis but did not include dividends from subsidiaries or other investee corporations, believing at the time that such dividends were not includible. Unisys reported its net worth on a separate company, unconsolidated basis. Unisys believes that the Commonwealth cannot tax Unisys on its consolidated capital stock value, particularly where the Commonwealth taxes the capital stock tax value of its subsidiaries taxable in Pennsylvania. Unisys elected to apportion its capital stock value within and without Pennsylvania using the three-factor formula (with a factor for each of tangible property, payroll and sales), as opposed to the single factor asset apportionment formula. In subsequent appeals for certain of these years, Unisys requested that the tax be settled at the lower of three-factor or single-factor apportionment.

6. Unisys subsidiaries doing business in Pennsylvania during the years 1984 through 1994 timely filed Pennsylvania Franchise Tax returns for the years 1984 through 1994.

7. The Pennsylvania Department of Revenue (the "Department") settled the Franchise Tax of Unisys for the tax years 1984 through 1994 by increasing the amount reported as net worth by Unisys to include the value of Unisys's investments in its subsidiaries. Net worth as settled by the Department was consolidated net worth as reflected in Unisys's annual report to shareholders which was certified by Unisys's auditors to be in accordance with generally accepted accounting principles. The Department included in average net income of Unisys, computed on a separate company, nonconsolidated basis, dividends paid from subsidiaries and investee

corporations. The Department settled the Franchise Tax using apportionment factors reported by Unisys.

8. The Department settled the Franchise Tax of each Unisys subsidiary filing Franchise Tax reports for the years 1984 through 1994 by including in net worth the net worth of each such subsidiary and any of its subsidiaries without reduction for the net worth of any subsidiary that was included in the determination of the consolidated net worth of Unisys. The Department added to average net income of each subsidiary dividends paid to it by subsidiary corporations. No deduction was made to average net income for any subsidiary for dividends paid to Unisys by any such subsidiary.

9. In settling Unisys's Franchise Tax for the years 1984 through 1994, the Department calculated Unisys's property, payroll, and sales apportionment factors on a separate company basis. Each factor contained only property, payroll and sales of Unisys; it did not include items of property, payroll and sales of any of Unisys's subsidiaries.

10. The Department calculated the property, payroll, and sales apportionment factors of those Unisys subsidiaries filing Pennsylvania Franchise Tax reports for the years 1984 thru 1994 on a separate company basis, similar to the method followed for Unisys described in Paragraph 9.

11. In settling Unisys's Franchise Tax for the years 1984 through 1994, the Department did not reduce the consolidated net worth of Unisys by the net worth of any Unisys subsidiary doing business in Pennsylvania and paying Franchise Tax for the same years on its net worth apportioned to Pennsylvania.

12. The Department believes its settlements were in accordance with the Tax Reform Code and the Department's regulations.

13. Unisys filed timely appeals to all of the Department's settlements.

14. Attachment A is a list of the subsidiaries of Unisys in each of the tax years at issue, along with Unisys's percentage ownership of each subsidiary and the jurisdictions in which the subsidiaries are organized.

15. Attachment B lists for the years 1984 through 1994:

Column A.	Net worth reported by Unisys on a separate company basis.
Column B.	Net worth settled by the Department on a consolidated basis.
Column C.	Average net income reported by Unisys without dividends received.
Column D.	Average net income settled by the Department including dividends received.
Column E.	Capital stock value reported by Unisys on the basis of columns A and C.
Column F.	Capital stock value settled by the Department on the basis of columns B and D.

In each case, the amounts are after certain adjustments that are not contested here.

16. Attachment C is omitted.

17. Attachment D shows, for 1984 through 1994 three-factor apportionment purposes, the value of property in Pennsylvania and everywhere owned by Unisys (unconsolidated), its subsidiaries, and Unisys and its subsidiaries (consolidated).

18. Attachment E shows, for 1984 through 1994 three-factor apportionment purposes, the gross receipts in Pennsylvania and everywhere of Unisys (unconsolidated), its subsidiaries, and Unisys and its subsidiaries (consolidated).

19. Attachment F shows, for 1984 through 1994 three-factor apportionment purposes, the payroll in Pennsylvania and everywhere of Unisys (unconsolidated), its subsidiaries, and Unisys and its subsidiaries (consolidated).

20. Attachment G shows amounts of dividends paid by Unisys subsidiaries to Unisys for 1984 through 1994.

21. Attachment H shows the following three-factor apportionment fractions. Column A shows the apportionment fractions calculated on a separate company basis as claimed by the Commonwealth. The factors used in the Commonwealth's fractions do not include the property, receipts and payroll of Unisys subsidiaries. Column B shows the apportionment factors calculated on a consolidated basis as claimed by Unisys. The items used in the numerator and denominator of the Unisys fractions include the property, receipts and payroll of Unisys and its subsidiaries. Columns C shows column A minus column B divided by column B, expressed as a percentage. Column D shows column A minus column B, expressed as a percentage.

/s/Kevin A. Moury December 30, 1997
Kevin A. Moury

/s/Joseph C. Bright December 22, 1997
Joseph C. Bright

ATTACHMENT A
Unisys Subsidiaries

Burroughs Corporation
Subsidiary Listing
Year Ended 12/31/84

Jurisdiction of Incorporation Foreign Entities	Name	Ownership Percentage
Japan	Burroughs Company, Ltd.	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
Switzerland	Burroughs International S.A.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
Singapore	Memorex Singapore Pte. Ltd.	100%
Hong Kong	Burroughs Far East Ltd.	100%
Japan	Japan Softec Company, Ltd.	50%
Switzerland	BAG Omnis Trading Company (Inactive)	100%
Norway	Burroughs A/S	100%
Holland	Burroughs B.V.	100%
Austria	Burroughs Computer Systems Gesellschaft m.b.H. (Inacti	100%
Germany	Burroughs Deutschland G.m.b.H.	100%
Portugal	Burroughs Electronica (Portugal) Lda.	100%
Spain	Burroughs S.A.	100%
Switzerland	Burroughs (Schweiz) A.G.	100%
Denmark	BMRX Holding (Denmark) A/S	100%
India	Tata Burroughs Ltd.	50%
Holland	Burroughs Netherlands Business Forms B.V.	100%

Germany	Redactron Service G.m.b.H. (Inactive)	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Burroughs Machines (UK) Ltd.	100%
England	Memorex U.K. Ltd.	100%
Denmark	Burroughs Data Systemer A/S	100%
Denmark	Memorex A/S (Denmark)	100%
Venezuela	Burroughs de Venezuela C.A.	100%
Austria	Burroughs Detenverarbeitung Gesellschaft m.b.H.	100%
England	Burroughs Europe-Africa Marketing, Ltd.	100%
Belgium	Compagnie Beige Burroughs S.A.	100%
Mexico	Industrias Mexicanas Burroughs, S.A. de C.V.	100%
France	Societe Anonyme Burroughs	100%
England	Burroughs Leasing Company Lt ..	100%
Bahamas	Burroughs Bahamas Ltd.	100%
Brazil	Burroughs Eletronica Ltda.	100%
Brazil	Formularios E Suprimentos Burroughs Ltda.	100%
Mexico	Burroughs, S.A. de C.V.	100%
Canada Dominion	Burroughs Memorex Inc.	100%
Hong Kong	Burroughs Machines (Hong Kong) Ltd.	100%
Taiwan (ROC)	Burroughs (Taiwan) Ltd.	100%
Sweden	Burmex Holding Sweden Aktiebolag	100%
New Zealand	Future Systems Ltd.	100%
Sweden	Burroughs Aktiebolag	100%
Sweden	Memorex A.B. (Sweden)	100%
Australia	Memorex Finance Pty. Ltd.	100%

Australia	Memorex Pty. Ltd.	100%
Austria	Memorex Ges.M.B.H. (Austria) (Inactive)	100%
Brazil	Memorex DO Brasil	100%
Belgium	Memorex S.A. (Belgium)	100%
Cayman Islands	Memorex World Trade Corporation	100%
France	Memorex S.A.	100%
Finland	Oy Memorex Ab (Finland) (Inactive)	100%
Italy	Burroughs-Memorex S.p.A.	100%
Ireland	Memorex Corporation (Ireland) Ltd.	100%
Japan	Memorex Japan Ltd.	60%
Japan	Teijin Memorex Company Ltd.	49%
Mexico	Memorex S.A. de C.V.	100%
Mexico	MEM-MEX S.A. de C.V.	100%
Mexico	Memorex Magdalena, S.A. de C.V.	100%
Netherlands	Memorex B.V. (Netherlands)	100%
Netherlands	MIFCO B.V.	100%
Norway	Memorex A.S. (Norway)	100%
Peru	Memorex S.R.L. (Peru)	100%
Switzerland	Memorex A.G. (Zurich)	100%
Venezuela	Memorex Interamerica C.A. (Venezuela)	100%
West Germany	Memorex GmbH (Germany)	100%
France	Societe de Location et d'Entretien Machines Electroniques	100%
England	SDC (1981) Ltd.	50%

Domestic Entities

Delaware	Burroughs Export Corporation	100%
Delaware	Burroughs Far East, Inc.	100%

Michigan	Burroughs Finance Corporation	100%
Delaware	Burroughs Information Systems, Ltd. (Inactive)	100%
Delaware	Burroughs International Company	100%
Delaware	Burroughs International Government Sales, Inc.	100%
Delaware	Burroughs International Trading Company	100%
Delaware	Burroughs Transport Corporation	100%
Delaware	Graftek, Inc.	100%
California	BMX Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
Delaware	System Development Corporation	100%
Michigan	Systems Research Inc.	100%
California	Memorex Corporation	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Latin America, Inc.	100%
Delaware	Burroughs OEM Corporation	100%
Delaware	Burroughs OEM Marketing Corporation	100%
Delaware	Burroughs Pacific, Inc.	100%
Delaware	Plasma Graphics Corporation	80%
Michigan	Burroughs Machines, Ltd.	100%
Delaware	Burroughs Overseas Ltd.	100%
Delaware	BMX Holdings Ltd.	100%
Colorado	Graphics Technology Disc, Inc.	100%
Delaware	Burroughs Caribbean Ltd.	100%
Delaware	Burroughs de Centro America, S.A.	100%
Delaware	Burroughs de Chile, S.A.	100%
Delaware	Burroughs de Colombia, S.A.	100%
Delaware	Burroughs del Peru, S.A.	100%
Michigan	Burroughs, Inc.	100%

Michigan	Compania Burroughs de Maquinas, Ltda.	100%
Michigan	Compania Burroughs Mexicana Sociedad Anonima	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%
Delaware	Burroughs Asia Ltd.	100%
Michigan	Burroughs, Ltd.	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
California	BST International, Inc.	100%
California	CFI Memories DISC	100%
California	Disk Media Inc.	60%
Delaware	Eumea Services Ltd.	100%
California	Image Products Corporation	100%
California	Information Printing Systems Corporation (Inactive)	100%
California	Memorex DIC Corporation	57%
California	Memorex DISC Corporation	100%
California	Memorex Distribution and Services Corporation	100%
California	Memorex Finance Company	100%
California	Memorex International Corporation	100%
Delaware	Memorex International Finance Holding Company (Inactive)	100%
Delaware	Memorex International Ltd.	100%
California	Memorex New Zealand Ltd.	100%
Delaware	Memorex Puerto Rico Inc.	100%
California	Midwest Systems Corporation	100%
California	M/R Systems Corporation (Inactive)	100%
Delaware	MRX Corporation of Delaware	100%

California	MRX Engineering and Development Corporation	100%
California	MRX Video Corporation	100%
Delaware	Peripheral Components Inc.	40%
California	Universal Business Systems, Inc. (Inactive)	100%
Delaware	Memorex Ribbon Corporation	100%
California	Bordeaux Leasing Inc.	100%
Delaware	SDC Contracting Corporation	100%
Delaware	SDC Development Corporation	100%
Delaware	SDC Integrated Services (1976) Inc.	100%
Delaware	SDC Integrated Services, Inc.	100%
California	SDC Search Services, Inc.	100%
California	Integration Installation International, Inc.	100%
California	Mechanics Research, Inc.	100%
California	Systems Management and Engineering Corporation	100%

Burroughs Corporation
Subsidiary Listing
Year Ended 12/31/85

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Japan	Burroughs Company, Ltd.	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
Switzerland	Burroughs International S.A.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%

Singapore	Memorex Singapore Pte. Ltd.	100%
Japan	Japan Softec Company, Ltd.	50%
Singapore	Burroughs-Cyberware Pte. Ltd.	50%
Venezuela	Burroughs de Venezuela C.A.	100%
Austria	Burroughs Detenverarbeitung Gesellschaft m.b.H.	100%
England	Burroughs Europe-Africa Marketing, Ltd.	100%
Belgium	Compagnie Beige Burroughs S.A.	100%
Mexico	Industrias Mexicanas Burroughs, S.A. de C.V.	100%
France	Societe Anonyme Burroughs	100%
Hong Kong	Burroughs Far East Ltd.	100%
England	SDC (1981) Ltd.	50%
Canada	SDC Systems Canada Inc.	100%
Switzerland	BAG Omnis Trading Company	100%
Norway	Burroughs A/S	100%
Holland	Burroughs B.V.	100%
Austria	Burroughs Computer Systeme Gesellschaft m.b.H. (Inactiv	100%
Germany	Burroughs Deutschland G.m.b.H.	100%
Portugal	Burroughs Electronica (Portugal) Lda.	99%
Spain	Burroughs S.A.	100%
Switzerland	Burroughs (Schweiz) A.G.	100%
Denmark	BMRX Holding (Denmark) A/S	100%
India	Tata Burroughs Ltd.	39.90%
Holland	Burroughs Netherlands Business Forms B.V.	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Burroughs Machines (UK) Ltd.	100%
England	Memorex U.K. Ltd.	100%

Denmark	Burroughs Data Systemer A/S	100%
Denmark	Memorex A/S (Denmark)	100%
England	Burroughs Leasing Company Ltd. (Inactive)	100%
Bahamas	Burroughs Bahamas Ltd.	100%
Brazil	Burroughs Eletronica Ltda.	100%
Mexico	Burroughs, S.A. de C.V.	100%
Brazil	Formularios E Suprimentos Burroughs Ltda.	100%
Canada Dominion	Burroughs Memorex, Inc.	100%
Hong Kong	Burroughs Machines (Hong Kong) Ltd.	100%
Taiwan (ROC)	Burroughs (Taiwan) Ltd.	100%
Sweden	Burmex Holding Sweden Aktiebolag	100%
New Zealand	Future Systems Ltd.	100%
Sweden	Burroughs Aktiebolag	100%
Sweden	Memorex A.B. (Sweden)	100%
Australia	Memorex Pty. Ltd.	100%
Austria	Memorex Ges.M.B.H. (Austria) (Inactive)	100%
Brazil	Memorex DO Brasil	100%
Belgium	Memorex S.A. Belgium	100%
Cayman Islands	Memorex World Trade Corporation	100%
France	Memorex S.A.	100%
Finland	Oy Memorex Ab (Finland) (Inactive)	100%
Italy	Burroughs-Memorex S.p.A.	100%
Ireland	Memorex Corporation (Ireland) Ltd.	100%
Japan	Memorex Japan Ltd.	60%
Japan	Teijin Memorex Company Ltd.	49%

Mexico	Memorex S.A. de C.V.	100%
Mexico	MEM-MEX S.A. de C.V.	100%
Mexico	Memorex Magdalena, S.A. de C.V.	100%
Netherlands	Memorex B.V. (Netherlands)	100%
Netherlands	MIFCO B.V.	100%
Norway	Memorex A.S. (Norway)	100%
Peru	Memorex S.R.L. (Peru) (Inactive)	100%
Switzerland	Memorex A.G. (Zurich)	100%
Venezuela	Memorex Interamerica C.A. (Venezuela)	100%
West Germany	Memorex GmbH (Germany)	100%
South Africa	Memorex Propriety Ltd. (Inactive)	100%
Australia	Memorex Finance Pty. Ltd.	100%
France	Societe de Location et d'Entretien Machines Electroniques	100%

Domestic Entities

California	BMX Inc.	100%
Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Far East, Inc.	100%
Michigan	Burroughs Finance Corporation	100%
Delaware	Burroughs Information Systems, Ltd. (Inactive)	100%
Delaware	Burroughs International Company	100%
Delaware	Burroughs International Government Sales, Inc.	100%
Delaware	Burroughs International Trading Company	100%
Delaware	Burroughs Transport Corporation	100%
Delaware	Graftek, Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
Delaware	System Development Corporation	100%

Michigan	Systems Research Inc.	100%
California	Memorex Corporation	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Latin America, Inc.	100%
Delaware	Burroughs OEM Corporation (Inactive)	100%
Delaware	Burroughs OEM Marketing Corporation (Inactive)	100%
Delaware	Burroughs Pacific, Inc.	100%
Colorado	Graphics Technology Disc, Inc.	100%
Delaware	SDC Contracting Corporation (Inactive)	100%
California	Integration Installation International, Inc.	100%
Delaware	Plasma Graphics Corporation	100%
Michigan	Burroughs Machines, Ltd.	100%
Delaware	Burroughs Overseas Ltd.	100%
Delaware	BMX Holdings Ltd.	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%
Delaware	Burroughs Caribbean Ltd.	100%
Delaware	Burroughs de Centro America, S.A.	100%
Delaware	Burroughs de Chile, S.A.	100%
Delaware	Burroughs de Colombia, S.A.	100%
Delaware	Burroughs del Peru, S.A.	100%
Michigan	Burroughs, Inc.	100%
Michigan	Compania Burroughs de Maquinas, Ltda.	100%
Michigan	Compania Burroughs Mexicana Sociedad Anonima (Inactiv	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%

Delaware	Burroughs Asia Ltd.	100%
Delaware	Burroughs Asia Services Ltd.	100%
Michigan	Burroughs, Ltd.	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
California	Business Systems Technology, Inc.	100%
California	CFI Memories Inc.	100%
California	Disk Media Inc.	60%
Delaware	Eumea Services Ltd.	100%
California	Image Products Corporation	100%
California	Information Printing Systems Corporation (Inactive)	100%
California	Memorex DIC Corporation	57%
California	Memorex DISC Corporation	100%
California	Memorex Finance Corporation	100%
California	Memorex International Corporation	100%
Delaware	Memorex International Finance Holding Company (Inactive)	100%
Delaware	Memorex International Ltd.	100%
California	Memorex New Zealand Ltd. (Inactive)	100%
Delaware	Memorex Puerto Rico Inc.	100%
California	Midwest Systems Corporation (Inactive)	100%
California	M/R Systems Corporation (Inactive)	100%
Delaware	MRX Corporation of Delaware	100%
California	MRX Engineering and Development Corporation	100%
California	MRX Video Corporation (Inactive)	100%
California	Universal Business Systems, Inc. (Inactive)	100%
California	BST International Inc.	100%

Delaware	Memorex Ribbon Corporation	100%
California	Bordeaux Leasing Inc.	100%
California	CFI Memories Disc	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/86

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Japan	Burroughs Company, Ltd.	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
Switzerland	Burroughs International S.A.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Australia	C3 Pty. Ltd.	49%
Bermuda	Galactic Assurance Group Ltd.	100%
New Zealand	New Holland (1967) Ltd.	100%
Canada	New Holland Machine Company (Canada) (1966) Ltd.	100%
Japan	Nippon Univac Kaisha, Ltd.	33%
Japan	Oki Univac Kaisha, Ltd.	48%
Finland	OY Unisys AB	100%
Peru	Remington Peruana Equipos de Oficina SA (Inactive)	100%
Mexico	Remington Rand de Mexico, SA (inactive)	100%
Venezuela	Remington Venezuela CA (Inactive)	100%
Portugal	Solor Sociedade Lusitana de Organizacoes, Ltd.	100%
Austria	Sperry Bet m.b.H.	100%
Venezuela	Sperry CA (Inactive)	100%

Cayman Islands	Sperry Cayman Islands	100%
Colombia	Sperry Colombians SA (Inactive)	92%
New Zealand	Sperry Computer Systems Ltd.	100%
Netherlands Antilles	Sperry Curacao N.V.	100%
Netherlands	Sperry International Finance Corporation B.V.	100%
Mexico	Sperry SA de C.V.	100%
Australia	STS Ltd.	51%
Australia	Synercom Australia Pty. Ltd.	100%
Japan	Tokyo Keiki Company, Ltd.	4%
Sweden	Unisys AB	100%
Argentina	Unisys Argentina SA	100%
Italy	Unisys Italia S.p.A.	100%
Mexico	Univac de Mexico, S.A. (Inactive)	100%
Japan	Japan Softec Company, Ltd.	50%
Austria	Burroughs Datenverarbeitung Gesellschaft m.b.H.	100%
Mexico	Industries Mexicanas Burroughs, SA de C.V.	100%
Belgium	Unisys Belgium	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
France	Unisys France	100%
Hong Kong	Unisys (Asia) Ltd.	100%
England	SDC (1981) Ltd.	50%
Singapore	Burroughs-Cyberware Pte. Ltd.	50%
Canada	Burroughs-Cyberware Canada, Inc.	100%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systeme Gesellschaft m.b.H. (Inactive)	100%

Portugal	Burroughs Electronica (Portugal) Lda.	100%
Norway	Sperry A/S	100%
India	Tata Unisys Ltd.	39.90%
Netherlands	Unisys B.V.	100%
West Germany	Unisys Deutschland G.m.b.H.	100%
Spain	Unisys Espana, S.A.	100%
South Africa	Unisys South Africa (Pty.) Ltd.	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Sperry Ltd.	100%
England	Burroughs Machines Ltd.	100%
England	Unisys Ltd.	100%
Mexico	Compubur, S.A. de C.V.	49%
Brazil	Formularios E Suprimentos Burroughs Ltda.	100%
South Africa	Sperry (Proprietary) Ltd.	100%
Sweden	Burmex Holding Sweden Aktiebolag	100%
New Zealand	Future Systems Ltd.	100%
Singapore	Unisys International (Singapore) Pte. Ltd.	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Switzerland	Sperry Finanz AG	100%
Sweden	Sperry Holding AB (Inactive)	100%
Norway	Sperry Holding Norge A/S (Inactive)	100%
Brazil	Sperry Industria e Comercio Ltda.	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
Australia	Sperry Ltd.	100%

Switzerland	Sperry Overseas Corporation	100%
Netherlands Antilles	Sperry Overseas N.V.	100%
Switzerland	Sperry Rand International Corporation	100%
France	Sperry SA	100%
Spain	Sperry S.A.	100%
West Germany	Sperry Zentrallager Europa GmbH	100%
Greece	Trade and Industry Sperry L.L.C.	100%
Denmark	Unisys A/S	99%
Canada	Unisys Canada Inc.	100%
Mexico	Unisys de Mexico, S.A.de C.V.	100%
Brazil	Unisys Electronica Ltda.	100%
Hong Kong	Unisys (Hong Kong) Ltd.	100%
Korea	Unisys Ltd.	100%
Netherlands	Unisys Nederland N.V.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Virgin Islands	Sperry International Foreign Sales Corporation	100%
Austria	Sperry Ges. m.b.H.	100%
Canada	Paramax Electronics Inc.	100%
Denmark	BMRX Holding (Denmark) A/S	100%
Canada	Sperry Finance Inc.	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
England	Sperry Rand Ltd. (Inactive)	100%
England	Sperry Trustees Ltd.	100%
Italy	Remdex, S.p.A.	100%
Norway	Univac A/S (Inactive)	100%
Saudi Arabia	Sperry Arabia Ltd.	49%

Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Hong Kong	Burroughs Machines (Hong Kong) Ltd.	100%
Hong Kong	Sperry (Hong Kong) Ltd.	100%
Italy	Unisys Finanziaria S.p.A.	100%
Mexico	MEM-MEX S.A.de C.V.	100%
South Africa	Memorex Propriety Ltd. (Inactive)	100%
Netherlands	MIFCO B.V.	100%
Domestic Entities		
California	BMX Inc.	100%
Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Information Systems, Ltd. (Inactive)	100%
Delaware	Burroughs International Holding Company	100%
Delaware	Burroughs International Government Sales, Inc.	100%
Delaware	Burroughs Systems Inc.	100%
Delaware	Burroughs Transport Corporation	100%
Delaware	Foundation Computer Systems, Inc.	100%
Delaware	Graftek, Inc.	100%
Delaware	Harrison Credit Group, Inc.	50%
Delaware	Inplex International Corporation	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
Delaware	Ramac Services Corporation	100%
Delaware	Sperry Asia, Inc.	100%

Delaware	Sperry Capital Management Corporation	100%
Delaware	Sperry Dalmo Victor, Inc.	50%
Delaware	Sperry Financial Corporation	100%
Delaware	Sperry Holding Company, Inc.	100%
Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Lease Finance Corporation	100%
Delaware	Sperry Leasing Corporation	100%
Delaware	Sperry Mapper Services, Inc.	100%
Delaware	Sperry Overseas Services Corporation	100%
Delaware	Sperry Rand Corporation	100%
Delaware	Sperry World Trade, Inc.	100%
Delaware	System Development Corporation	100%
Delaware	Unisys China Investments Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys International Trading Company	100%
California	Unisys Peripherals Corporation	100%
Delaware	Burroughs-Cyberware, Inc.	50%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs OEM Corporation (Inactive)	100%
Delaware	Burroughs OEM Marketing Corporation (Inactive)	100%
Delaware	Burroughs Pacific, Inc.	100%
Delaware	Unisys International Procurement Company, Inc.	100%
Colorado	Graphics Technology Disc, Inc.	100%

California	Integration Installation International, Inc.	100%
Delaware	SDC Contracting Corporation (Inactive)	100%
Delaware	BMX Holdings Ltd.	100%
Michigan	Burroughs Machines. Ltd. (South Africa)	100%
Delaware	Unisys Overseas Ltd.	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%
Delaware	U.K Holdings 1 Ltd.	100%
Delaware	U.K Holdings 2 Ltd.	100%
Delaware	Plasma Graphics Corporation	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
Michigan	Unisys Australia Ltd.	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys PRC Ltd.	100%
Delaware	Brazilian Equity, Inc.	100%
Delaware	Burroughs Caribbean Ltd.	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%
Michigan	Compania Burroughs Mexicana SA (Inactive)	100%
Delaware	South American Equities, Inc.	100%
Delaware	Unisys (Chile) Corporation	100%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%
Delaware	Unisys del Peru Corporation	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	Sperry New Holland Credit Corporation	100%

Delaware	Sperry International Capital Corporation	100%
California	BST International Inc. (Inactive)	100%
California	CFI Memories DISC (Inactive)	100%
Delaware	Eumea Services Ltd. (Inactive)	100%
California	Image Products Corporation (Inactive)	100%
California	Information Printing Systems Corporation (Inactive)	100%
California	Midwest Systems Corporation (Inactive)	100%
California	M/R Systems Corporation (Inactive)	100%
Delaware	Unisys Peripherals Corporation of Delaware (Inactive)	100%
California	Unisys Peripherals DISC Corporation (Inactive)	100%
California	Unisys Peripherals Engineering and Development Corp. (Inactive)	100%
California	Unisys Peripherals Ink and Chemical Corporation (Inactive)	100%
California	Unisys Peripherals International Corporation (DISC) (Inactive)	100%
Delaware	Unisys Peripherals International Finance Holding Co. (Inactive)	100%
California	Unisys Peripherals New Zealand Ltd. (Inactive)	100%
California	Unisys Peripherals Video Corporation (Inactive)	100%
California	Universal Business Systems, Inc. (Inactive)	100%
Delaware	Unisys Peripherals Ribbon Corporation (Inactive)	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/87

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Japan	Burroughs Company, Ltd.	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
Switzerland	Burroughs International S.A.	100%
England	Burroughs Machines Ltd.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
New Zealand	New Holland (1967) Ltd.	100%
Canada	New Holland Machine Co. (Canada) (1966) Ltd. (Inactive)	100%
Japan	Nippon Univac Kaisha, Ltd.	33%
Japan	Oki Univac Kaisha, Ltd.	48%
Finland	OY Unisys AB	100%
Peru	Remington Peruana Equipos de Oficina S.A. (Inactive)	100%
New Zealand	Remington Rand (1967) Ltd.	100%
Mexico	Remington Rand de Mexico, S.A. (Inactive)	100%
Venezuela	Remington Venezuela C.A. (Inactive)	100%
England	SDC (1981) Ltd.	50%
Portugal	Solor Sociedade Lusitana de Organizacoes, Lda.	100%
Austria	Sperry Bet m.b.H.	100%
Venezuela	Sperry C.A. (Inactive)	100%
Cayman Islands	Sperry Cayman Islands	100%

Colombia	Sperry Colombians S.A. (Inactive)	92%
New Zealand	Sperry Computer Systems Ltd.	100%
Netherlands Antilles	Sperry Curacao N.V.	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Netherlands	Sperry International Finance Corporation B.V.	100%
Mexico	Sperry, S.A.deC.V.	100%
Australia	STS Limited	51%
Australia	Synencom Australia Pty. Ltd.	100%
Sweden	Unisys AB	100%
Italy	Unisys Italia S.p.A.	100%
Mexico	Univac de Mexico, S.A. (Inactive)	100%
Mexico	Industrias Mexicanas Burroughs, S.A. de C.V.	100%
Belgium	Unisys Belgium	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
France	Unisys France	100%
Hong Kong	Unisys (Asia) Ltd.	100%
Singapore	Burroughs-Cyberware Pte. Ltd.	100%
Canada	Burroughs-Cyberware Canada, Inc.	100%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systems Gesellschaft m.b.H. (Inactive)	100%
Portugal	Burroughs Electronics (Portugal) Lda.	100%
Norway	Sperry A/S	100%
India	Tata Unisys Ltd.	39.90%
Netherlands	Unisys B.V.	100%
West Germany	Unisys Deutschland G.m.b.H.	100%

Spain	Unisys Espana, S.A.	100%
England	Unisys Holdings	100%
Norway	Unisys Norge A/S	100%
South Africa	Unisys South Africa (Pty.) Ltd.	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Sperry Limited	100%
England	Unisys Limited	100%
Mexico	Compubur, S.A.deC.V.	49%
Brazil	Unisys Formularios e Suprimentos Ltda.	100%
South Africa	Sperry (Proprietary) Ltd.	100%
Sweden	Burmex Holding Sweden Aktiebolag	100%
New Zealand	Future Systems Ltd.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Switzerland	Sperry Finanz AG	100%
Sweden	Sperry Holding AB (Inactive)	100%
Norway	Sperry Holding Norge A/S (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
Australia	Sperry Limited	100%
Switzerland	Sperry Overseas Corporation	100%
Netherlands Antilles	Sperry Overseas N.V.	100%
Switzerland	Sperry Rand International Corporation	100%
Spain	Sperry S.A.	100%

West Germany	Sperry Zentrallager Europe GmbH	100%
Greece	Trade and Industry Sperry L.L.C.	100%
Denmark	Unisys A/S	99%
Canada	Unisys Canada Inc.	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Brazil	Unisys Electronica Ltda.	100%
Hong Kong	Unisys (Hong Kong) Ltd.	100%
Korea	Unisys Ltd.	100%
Netherlands	Unisys Nederland N.V.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Virgin Islands	Sperry International Foreign Sales Corporation	100%
Austria	Unisys Osterreich Gesellschaft m.b.H.	100%
Canada	Paramax Electronics Inc.	100%
Denmark	BMRX Holding (Denmark) A/S	100%
Canada	Sperry Finance Inc.	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
England	Sperry Rand Ltd. (Inactive)	100%
England	Sperry Trustees Ltd.	100%
Argentina	Unisys Argentina S.A.	100%
Norway	Univac A/S (Inactive)	100%
Saudi Arabia	Sperry Arabia Ltd.	49%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Hong Kong	Burroughs Machines (Hong Kong) Ltd.	100%
Hong Kong	Sperry (Hong Kong) Ltd.	100%

Italy	Technologica S.p.a.	71%
Italy	Unisys Finanziaria S.p.A.	100%
Mexico	MEM-MEX S.A. de C.V.	100%
Netherlands	MIFCO B.V.	100%
Domestic Entities		
Delaware	Brazilian Equity, Inc.	100%
California	BST International Inc. (Inactive)	100%
Delaware	Burroughs Caribbean Ltd.	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Information Systems, Ltd. (Inactive)	100%
Delaware	Burroughs International Government Sales, Inc.	100%
Delaware	Burroughs International Holding Company	100%
Michigan	Burroughs Machines, Ltd. (South Africa)	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%
Delaware	Burroughs OEM Corporation (Inactive)	100%
Delaware	Burroughs OEM Marketing Corporation (Inactive)	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
Delaware	Burroughs Pacific, Inc.	100%
Delaware	Burroughs Systems Inc.	100%
Delaware	Burroughs Transport Corporation	100%
California	CFI Memories DISC (Inactive)	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%

Michigan	Campania Burroughs Mexicana S.A. (Inactive)	100%
Delaware	Eumea Services Ltd. (Inactive)	100%
Delaware	Foundation Computer Systems, Inc.	100%
Colorado	Graphics Technology Disc, Inc.	100%
California	Image Products Corporation (Inactive)	100%
California	Information Printing Systems Corporation (Inactive)	100%
Delaware	Inplex International Corporation	100%
California	Intergration Installation International, Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
California	M/R System Corporation (Inactive)	100%
California	Midwest Systems Corporation (Inactive)	100%
Delaware	Plasma Graphics Corporation	100%
Delaware	Ramac Services Corporation	100%
Delaware	South American Equities, Inc.	100%
Delaware	Sperry Capital Management Corporation	100%
Delaware	Sperry Dalmo Victor, Inc.	50%
Delaware	Sperry Financial Corporation	100%
Delaware	Sperry Holding Company, Inc.	100%
Delaware	Sperry International Capital Corporation	100%
Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Lease Finance Corporation	100%
Delaware	Sperry Leasing Corporation	100%

Delaware	Sperry Mapper Services, Inc.	100%
Delaware	Sperry Overseas Services Corporation	100%
Delaware	Sperry Rand Corporation	100%
Delaware	Unisys (Chile) Corporation	100%
Michigan	Unisys Australia Ltd.	100%
Delaware	Unisys CAD/CAM, Inc.	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys China Services, Inc.	100%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%
Delaware	Unisys del Peru Corporation	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Unisys International Procurement Co., Inc.	100%
Delaware	Unisys Japan, Ltd.	100%
Delaware	Unisys Overseas Ltd.	100%
California	Unisys Peripherals Corporation	100%
Delaware	Unisys Peripherals Corporation of Delaware (Inactive)	100%
California	Unisys Peripherals DISC Corporation (Inactive)	100%
California	Unisys Peripherals Engineering and Development Corp. (Inactive)	100%
California	Unisys Peripherals Ink and Chemical Corporation (Inactive)	100%
California	Unisys Peripherals International Corporation (DISC)	100%
Delaware	Unisys Peripherals International Finance Holding	100%

California	Unisys Peripherals New Zealand Ltd. (Inactive)	100%
Delaware	Unisys Peripherals Ribbon Corporation (Inactive)	100%
California	Unisys Peripherals Video Corporation (Inactive)	100%
Delaware	Unisys PRC Ltd.	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	Unisys World Trade, Inc.	100%
California	Universal Business Systems, Inc. (Inactive)	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/88

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Netherlands Antilles	Burroughs International Finance N.V.	100%
Switzerland	Burroughs International S.A.	100%
England	Burroughs Machines Ltd.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
New Zealand	New Holland (1967) Ltd.	100%
Canada	New Holland Machine Co. (Canada) (1966) Ltd. (Inactive)	100%
Japan	Nihon Unisys Kaisha, Ltd.	33%
Japan	Oki Unisys Kaisha, Ltd.	48%
Finland	OY Unisys AB	100%
Peru	Remington Peruana Equipos de Oficina S.A. (Inactive)	100%

Mexico	Remington Rand de Mexico, S.A. (Inactive)	100%
Venezuela	Remington Venezuela C.A. (Inactive)	100%
England	SDC (1981) Limited	50%
Austria	Sperry Bet. m.b.H.	100%
Venezuela	Sperry C.A. (Inactive)	100%
Cayman Islands	Sperry Cayman Islands	100%
Colombia	Sperry Colombiana S.A. (Inactive)	100%
New Zealand	Sperry Computer Systems Ltd. (Inactive)	100%
Netherlands Antilles	Sperry Curacao N.V.	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Netherlands	Sperry International Finance Corporation B.V.	100%
Australia	Synercom Australia Pty. Ltd.	100%
Sweden	Unisys AB	100%
Denmark	Unisys A/S	100%
West Germany	Unisys Deutschland GmbH	98%
Italy	Unisys Italia S.p.A.	100%
Portugal	Unisys Portugal-Sistemas de Informacao S.A.	100%
Mexico	Univac de Mexico, S.A. (Inactive)	100%
Australia	Lartron Limited	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Switzerland	Sperry Finanz AG	100%
Sweden	Sperry Holding AB (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
Switzerland	Sperry Overseas Corporation	100%

Netherlands Antilles	Sperry Overseas N.V.	100%
Switzerland	Sperry Rand International Corporation	100%
West Germany	Sperry Zentrallager Europa GmbH	100%
Greece	Trade and Industry Sperry L.L.C.	100%
Canada	Unisys Canada Inc.	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Brazil	Unisys Electronica Ltda.	100%
Spain	Unisys Espana, S.A.	100%
France	Unisys France	100%
Hong Kong	Unisys (Hong Kong) Ltd.	100%
Korea	Unisys Limited	100%
Malaysia	Unisys (Malaysia) Sdn. Bhd.	100%
Netherlands	Unisys Nederland N.V.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Portugal	Burroughs Electronica (Portugal) Lda.	100%
Mexico	Industrias Mexicanas Unisys, S.A. de C.V.	100%
Belgium	Unisys Belgium	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
Austria	Unisys Osterreich Ges. m.b.H.	100%
Canada	Sperry Finance Inc.	100%
Saudi Arabia	Sperry Arabia Ltd.	49%
Virgin Islands	Sperry International Foreign Sales Corporation	100%
Canada	Unisys Finance Canada, Ltd.	100%
Hong Kong	Unisys (Asia) Ltd.	100%

Italy	Tecnologica S.p.a.	71%
Portugal	UNISOFT-Sistemas Informaticos S.A.	35%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systeme Gesellschaft m.b.H. (Inactive)	100%
Portugal	Burroughs Electronica (Portugal) Lda.	100%
Netherlands	Burroughs/Sperry B.V.	100%
Norway	Sperry A/S	100%
India	Tata Unisys Ltd.	39.99%
England	Unisys Holdings	100%
Norway	Unisys Norge A/S	100%
Mexico	Compubur, S.A. de C.V.	49%
Sweden	Burmex Holding Sweden Aktiebolag	100%
New Zealand	Future Systems Limited	100%
Canada	Unisys Canada Inc.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
New Zealand	Unisys New Zealand Limited	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
West Germany	Unisys Deutschland GmbH	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Canada	Paramax Electronics Inc.	100%
Chile	Synapsis S.A.	49%
Singapore	Burroughs-Cyberware Pte. Ltd.	100%
Canada	Burroughs-Cyberware Canada, Inc.	100%

Denmark	BMRX Holding (Denmark) A/S (Inactive)	100%
Brazil	Unisys Formularios e Suprimentos Ltda.	100%
Hong Kong	Burroughs Hong Kong (1987) Ltd.	100%
Hong Kong	Sperry (Hong Kong) Ltd.	100%
Netherlands	Omnicon B.V.	100%
Netherlands	Unihouse B.V.	100%
Argentina	Unisys Sudamericana S.A.	100%
Argentina	IDAT, Industria de Alta Tecnologica, S.A.	49%
Norway	Univac A/S (Inactive)	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Unisys International Services Ltd.	100%
England	Unisys Limited	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
England	Sperry Rand Ltd. (Inactive)	100%
England	Sperry Trustees Ltd.	100%
Netherlands	MIFCO B.V.	100%
Mexico	Unisys Equipos Perifericos, S.A. de C.V.	100%
Italy	Unisys Finanziaria S.p.A.	100%
Netherlands	Timeplex, B.V.	100%
Germany	Timeplex GmbH	100%
England	Timeplex Holdings Ltd.	100%
Virgin Islands	Timeplex Virgin Islands Ltd.	100%
Netherlands	Timeplex Communications, B.V.	100%
Netherlands Antilles	TIX International, Inc.	100%
Canada	Timeplex Canada, Inc.	100%
Australia	Timeplex Australia	100%
Bermuda	Timeplex Bermuda	100%

Hong Kong	Timeplex Far East Ltd.	100%
England	Timeplex Ltd.	100%
Italy	Convergent Technologies S.r.l.	100%
Spain	Convergent Technologies S.A.	100%
England	Convergent Technologies (U.K.) Ltd.	100%
Germany	Convergent Technologies GmbH	100%
France	Convergent Technologies S.A. R.L.	100%
Canada	Convergent Technologies Canada Ltd.	100%

Domestic Entities

Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Information Systems, Ltd. (Inactive)	100%
Delaware	Burroughs International Government Sales, Inc.	100%
Delaware	Burroughs Systems Inc.	100%
Delaware	Burroughs Transport Corporation	100%
Delaware	Convergent, Inc.	100%
Delaware	Foundation Computer Systems, Inc.	100%
Delaware	Harrison Credit Group, Inc.	100%
California	Integration Installation International, Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
Delaware	Ramac Services Corporation	100%
Delaware	Sperry Capital Management Corporation	100%
Delaware	Sperry Dalmo Victor, Inc.	50%
Delaware	Sperry Financial Corporation	100%

Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Lease Finance Corporation	100%
Delaware	Sperry Leasing Corporation	100%
Delaware	Sperry Mapper Services, Inc.	100%
Delaware	Sperry Overseas Services Corporation	100%
Delaware	Sperry Rand Corporation	100%
Delaware	Timeplex, Inc.	100%
Delaware	Unisys CAD/CAM, Inc.	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys Holding Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Unisys Japan, Ltd.	100%
California	Unisys Peripherals Corporation	100%
Delaware	Unisys Services Corporation	100%
Delaware	Unisys World Trade, Inc.	100%
Delaware	Brazilian Equity, Inc.	100%
Delaware	Burroughs Caribbean Ltd. (Inactive)	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%
Delaware	Burroughs OEM Corporation (Inactive)	100%
Delaware	Burroughs OEM Marketing Corporation (Inactive)	100%
Delaware	Burroughs Pacific, Inc.	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%

Michigan	Compania Burroughs Mexicana S.A. (Inactive)	100%
Delaware	South American Equities, Inc.	100%
Delaware	Unisys (Chile) Corporation	100%
Delaware	Unisys-Cyberware, Inc.	50%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%
Delaware	Unisys del Peru Corporation	100%
Delaware	Unisys International Procurement Company	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	HCG Services, Inc.	100%
Delaware	Sperry International Capital Corporation	100%
Michigan	Burroughs Machines, Ltd.	100%
Delaware	Unisys Overseas Ltd.	100%
Delaware	Plasma Graphics Corporation (Inactive)	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
Michigan	Unisys Australia Ltd.	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys PRC Ltd.	100%
Delaware	Sperry New Holland Credit Corporation	100%
California	BST International Inc. (Inactive)	100%
California	CFI Memories DISC (Inactive)	100%
California	Image Products Corporation (Inactive)	100%
California	Information Printing Systems Corporation (Inactive)	100%
California	Midwest Systems Corporation (Inactive)	100%

California	M/R Systems Corporation (Inactive)	100%
California	Unisys Peripherals DISC Corporation (Inactive)	100%
California	Unisys Peripherals Ink and Chemical Corporation (Inactive)	100%
California	Unisys Peripherals International Corporation (DISC) (Inactive)	100%
California	Unisys Peripherals Video Corporation (Inactive)	100%
Delaware	Chestnut Ridge Associates	100%
Delaware	Chestnut Ridge Communications, Inc.	100%
Delaware	The Cygnus Computer Corporation	100%
Delaware	Timeplex Caribe Ltd.	100%
New Jersey	Timeplex Communications, Inc.	100%
New Jersey	Timeplex International, Inc.	100%
New Jersey	Timeplex International Communications, Inc.	100%
Delaware	Timeplex World Aviation, Inc.	100%
Florida	TIX Eighty-One Corporation	100%
Oregon	Bidtek, Inc.	100%
Delaware	Convergent Business Systems, Inc.	100%
California	Convergent Technologies, Inc.	100%
Delaware	Document Automation Corporation	100%
California	Bistek Merger Corporation	100%
Delaware	Convergent Holding Company	100%
California	Convergent Technolgies International	100%
Maryland	Business Systems Leasing	100%

California	Transcripts, Inc.	100%
Wyoming	Open Systems of Wyoming, Inc.	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/89

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Sweden	Burmex Holding Sweden AB	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
England	Burroughs Machines Ltd.	100%
Jamaica	Burroughs Overseas Sales Company Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
Netherlands	MIFCO B.V.	100%
New Zealand	New Holland (1967) Ltd.	100%
Canada	New Holland Machine Company (Canada) (1966) Ltd. (Inactive)	100%
Japan	Nihon Unisys, Ltd.	33%
Japan	Oki Unisys Kaisha, Ltd.	48%
Finland	OY Unisys AB	100%
Peru	Remington Peruana Equipos de Oficina S.A. (Inactive)	100%
Mexico	Remington Rand de Mexico, S.A. (Inactive)	100%
Venezuela	Remington Venezuela C.A. (Inactive)	100%
England	SDC (1981) Ltd.	99%
Austria	Sperry Bet. m.b.H.	100%
Venezuela	Sperry C.A. (Inactive)	100%
Cayman Islands	Sperry Cayman Islands	100%
Colombia	Sperry Colombiana S.A. (Inactive)	100%

New Zealand	Sperry Computer Systems Ltd. (Inactive)	100%
Netherlands Antilles	Sperry Curacao N.V.	100%
Canada	Sperry Finance Inc.	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Australia	Synercom Australia Pty. Ltd.	100%
Sweden	Unisys AB	100%
Denmark	Unisys A/S	100%
West Germany	Unisys Deutschland GmbH	100%
Mexico	Unisys Equipos Perifericos, S.A. de C.V.	100%
Italy	Unisys Finanziaria S.p.A	100%
Switzerland	Unisys Investments S.A.	100%
Italy	Unisys Italia S.p.A.	100%
Portugal	Unisys Portugal-Sistemas de Informacao S.A.	100%
Mexico	Univac de Mexico S.A. (Inactive)	100%
New Zealand	Future Systems Ltd.	100%
Australia	Lartron Ltd.	100%
Colombia	ROE Industria Colombiana S.A.	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Switzerland	Sperry Holding AB (Inactive)	100%
Sweden	Sperry Holding AB (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
Switzerland	Sperry Overseas Corporation	100%
Netherlands Antilles	Sperry Overseas N.V.	100%
Switzerland	Sperry Rand International Corporation	100%

West Germany	Sperry Zentrallager Europa GmbH	100%
Greece	Trade and Industry Sperry L.L.C.	100%
Canada	Unisys Canada Inc.	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Brazil	Unisys Electronica Ltda.	100%
Spain	Unisys Espana, S.A.	100%
France	Unisys France	100%
Hong Kong	Unisys (Hong Kong) Ltd.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
Korea	Unisys Korea Ltd.	100%
Malaysia	Unisys (Malaysia) Sdn. Bhd.	100%
Netherlands	Unisys Nederland N.V.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Portugal	Burroughs Electronica (Portugal) Lda.	100%
Mexico	Industrias Mexicanas Unisys, S.A. de C.V.	100%
Belgium	Unisys Belgium	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
Austria	Unisys Osterreich Ges. m.b.H.	100%
Saudia Arabia	Sperry Arabia Ltd.	49%
Virgin Islands	Sperry International Foreign Sales Corporation	100%
Canada	Unisys Finance Canada, Ltd.	100%
Hong Kong	Unisys (Asia) Ltd.	100%
Italy	Tecnologica S.p.a.	71%

Portugal	UNISOFT-Sistemas Informaticos S.A.	35%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systems Gesellschaft m.b.H. (Inactive)	100%
Netherlands	Burroughs/Sperry B.V.	100%
Norway	Sperry A/S	100%
India	Tata Unisys Ltd.	39.99%
England	Unisys Holdings	100%
Norway	Unisys Norge A/S	100%
Norway	Univas A/S (Inactive)	100%
Mexico	Compubur, S.A. de C.V.	49%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Canada	Paramax Electronics Inc.	100%
Chile	Synapsis S.A.	49%
Canada	Burroughs-Cyberware Canada, Inc.	100%
Denmark	BMRX Holding (Denmark) A/S (Inactive)	100%
Brazil	Unisys Formularios e Suprimentos Ltda.	100%
Hong Kong	Burroughs Hong Kong (1987) Ltd.	100%
Hong Kong	Sperry (Hong Kong) Ltd.	100%
Netherlands	Omnicon B.V.	100%
Netherlands	Unihouse B.V.	100%
Netherlands	Unisys Nederland Parts Distribution B.V.	100%
Argentina	Unisys Sudamericana S.A.	100%
Argentina	IDAT, Industria de Alta Tecnologica, S.A.	49%

England	BMX Information Systems (UK) Ltd.	100%
England	Unisys International Services Ltd.	100%
England	Unisys Ltd.	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
England	Sperry Rand Ltd. (Inactive)	100%
England	Sperry Trustees Ltd.	100%
England	Sperry Ltd.	100%
Australia	Timeplex Australia Pty. Ltd.	100%
Netherlands	Timeplex, B.V.	100%
West Germany	Timeplex GmbH	100%
England	Timeplex Holdings Ltd.	100%
Virgin Islands	Timeplex Virgin Islands Ltd.	100%
Netherlands	Timeplex Communications, B.V.	100%
Netherlands Antilles	TIX International, B.V.	100%
Canada	Timeplex Canada, Inc.	100%
Bermuda	Timeplex (Bermuda) Ltd.	100%
Hong Kong	Timeplex Far East Ltd.	100%
England	Timeplex Ltd.	100%
Italy	Convergent Technologies S.r.l.	100%
Spain	Convergent Technologies S.A.	100%
England	Convergent Technologies (U.K) Ltd.	100%
Germany	Convergent Technologies GmbH	100%
France	Convergent Technologies S.A. R.L.	100%
Canada	Convergent Technologies Canada Ltd.	100%

<u>Domestic Entities</u>

California	BST International Inc. (Inactive)	100%

Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Systems Inc.	100%
Delaware	Burroughs Transport Corporation	100%
California	CFI Memories DISC (Inactive)	100%
Delaware	Convergent, Inc.	100%
Delaware	Foundation Computer Systems, Inc.	100%
Delaware	Harrison Credit Group, Inc.	100%
California	Image Products Corporation (Inactive)	100%
California	Information Printing Systems Corporation (Inactive)	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
California	Midwest Systems Corporation (Inactive)	100%
California	M/R Systems Corporation	100%
Delaware	Ramac Services Corporation	100%
Delaware	Sperry Capital Management Corporation	100%
Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Lease Finance Corporation	100%
Delaware	Sperry Leasing Corporation	100%
Delaware	Sperry Mapper Services, Inc.	100%
Delaware	Sperry Rand Corporation	100%
Delaware	Timeplex, Inc.	100%
Delaware	Unisys CAD/CAM, Inc.	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Delaware	Unisys Defense International, Inc.	100%
Michigan	Unisys Finance Corporation	100%

Delaware	Unisys Holding Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Unisys Japan, Ltd.	100%
California	Unisys Peripherals DISC Corporation (Inactive)	100%
California	Unisys Peripherals Ink and Chemical Corporation (Inactive)	100%
California	Unisys Peripherals International Corporation (DISC) (Inactive	100%
California	Unisys Peripherals Video Corporation (Inactive)	100%
Delaware	Unisys Services Corporation	100%
Delaware	Unisys World Trade, Inc.	100%
Delaware	Brazilian Equity, Inc.	100%
Delaware	Burroughs Caribbean Ltd. (Inactive)	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%
Delaware	Burroughs OEM Corporation (Inactive)	100%
Delaware	Burroughs Pacific Finance Ltd.	100%
Michigan	Compania Burroughs de Venezuela, Inc.	100%
Michigan	Compania Burroughs Mexicana S.A. (Inactive)	100%
Delaware	Unisys Arabia, Inc.	100%
Michigan	Unisys Australia Ltd.	100%
Delaware	Unisys (Chile) Corporation	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys-Cyberware, Inc.	50%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%

Delaware	Unisys del Peru Corporation	100%
Delaware	Unisys International Procurement Company	100%
Delaware	Unisys PRC Ltd.	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	HCG Services, Inc.	100%
Delaware	Sperry International Capital Corporation	100%
Delaware	Unisys Overseas Ltd.	100%
Delaware	Plasma Graphics Corporation (Inactive)	100%
Delaware	Sperry New Holland Credit Corporation	100%
California	Broadband Telesystems Corporation	100%
Delaware	Chestnut Ridge Computer Corporation	100%
Delaware	The Cygnus Computer Corporation	100%
Delaware	Timeplex Caribe Ltd.	100%
New Jersey	Timeplex Communications, Inc.	100%
New Jersey	Timeplex International, Inc.	100%
New Jersey	Timeplex International Communications, Inc.	100%
Delaware	Timeplex World Aviation, Inc.	100%
Florida	TIX Eighty-One Corporation	100%
Delaware	Chestnut Ridge Communications, Inc.	100%
Oregon	Bidtek, Inc.	100%
Delaware	Convergent Business Systems, Inc.	100%
California	Convergent Technologies, Inc.	100%

Delaware	Document Automation Corporation	100%
Delaware	Bidtek Merger Corporation	100%
Maryland	Business Systems Leasing	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/90

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Sweden	Burmex Holding Sweden AB	100%
Netherlands Antilles	Burroughs International Finance N.V.	100%
England	Burroughs Machines Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
Netherlands	MIFCO B.V.	100%
New Zealand	New Holland (1967) Ltd.	100%
Japan	Nihon Unisys Ltd.	33.34%
Japan	Oki Unisys Kaisha, Ltd.	45.08%
Finland	OY Unisys AB	100%
Peru	Remington Peruana Equipos de Oficina S.A. (Inactive)	100%
Mexico	Remington Rand de Mexico, S.A. (Inactive)	100%
Colombia	Sperry Colombiana S.A. (Inactive)	100%
New Zealand	Sperry Computer Systems Ltd. (Inactive)	100%
Netherlands Antilles	Sperry Curacao N.V.	100%
Canada	Sperry Finance Inc.	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Australia	Synercom Australia Pty. Ltd.	100%

Sweden	Unisys AB	100%
Denmark	Unisys A/S	100%
West Germany	Unisys Deutschland GmbH	100%
Italy	Unisys Finanziaria S.p.A.	100%
Switzerland	Unisys Investments. S.A.	100%
Italy	Unisys Italia S.p.A.	100%
Austria	Unisys Osterreich G s.m.b.H.	100%
Portugal	Unisys Portugal-Sistemas de Informacao S.A.	100%
Mexico	Univac de Mexico S.A. (Inactive)	100%
New Zealand	Future Systems Ltd.	100%
Australia	Lartron Ltd.	100%
Colombia	ROE Industria Colombiana S.A.	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Switzerland	Sperry Finanz AG	100%
Sweden	Sperry Holding AB (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
Switzerland	Sperry Overseas Corporation	100%
Netherlands Antilles	Sperry Overseas N.V.	100%
Switzerland	Sperry Rand International Corporation	100%
West Germany	Sperry Zentrallager Europa GmbH	100%
Greece	Trade and Industry Sperry L.L.C.	100%
Denmark	Unisys A/S	100%
Canada	Unisys Canada Inc.	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Brazil	Unisys Electronica Ltda.	100%
Spain	Unisys Espana, S.A.	100%
France	Unisys France	100%

Hong Kong	Unisys (Hong Kong) Ltd.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
Korea	Unisys Korea Ltd.	100%
Malaysia	Unisys (Malaysia) Sdn. Bhd.	100%
Netherlands	Unisys Nederland, N.V.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Portugal	Burroughs Electronica (Portugal) Lda.	100%
Mexico	Industrias Mexicanas Unisys, S.A. de C.V.	100%
Poland	UNILOT Sz00	25%
USSR	UNIMAS	33.33%
Belgium	Unisys Belgium	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
Saudi Arabia	Sperry Arabia Ltd.	49%
Sweden	Unipos AB	50%
Canada	Unisys Finance Canada, Ltd.	100%
Hong Kong	Unisys (Asia) Ltd.	100%
Italy	INSERT S.p.A. (Ingegneria dei Sistemi e Reti Telematiche	100%
Italy	Tecnologica S.p.a.	71%
Portugal	UNISOFT-Sistemas Informaticos S.A.	35%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systems Gesellschaft (Inactive)	100%
Netherlands	Burroughs/Sperry B.V.	100%
Norway	Sperry A/S	100%

India	Tata Unisys Ltd.	39.99%
England	Unisys Holdings	100%
Norway	Unisys Norge A/S	100%
Mexico	Compubur, S.A. de C.V.	49%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Canada	Paramax Electronics, Inc.	100%
Chile	Synapsis S.A.	49%
Canada	Burroughs-Cyberware Canada, Inc.	100%
Denmark	BMRX Holding (Denmark) A/S (Inactive)	100%
Brazil	Unisys Formularios e Suprimentos Ltda.	100%
Hong Kong	Burroughs Hong Kong (1987) Ltd.	100%
Hong Kong	Sperry (Hong Kong) 1987 Ltd.	100%
Netherlands	Unihouse B.V.	100%
Netherlands	Omnicon B.V.	100%
Netherlands	Unisys Nederland Parts Distribution B.V.	100%
Argentina	Unisys Sudamericana S.A.	100%
Argentina	IDAT, Industria de Alta Tecnologica, S.A.	49%
Norway	Univac A/S (Inactive)	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Unisys International Services Ltd.	100%
England	Unisys Ltd.	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
England	Sperry Ltd.	100%
Australia	Timeplex Australia Pty. Ltd.	100%

Netherlands	Timeplex, B.V.	100%
West Germany	Timeplex GmbH	100%
England	Timeplex Holdings Ltd.	100%
Virgin Islands	Timeplex Virgin Island, Ltd.	100%
Netherlands	Timeplex Communications, B.V.	100%
Netherlands Antilles	TIX International, N.V.	100%
Canada	Timeplex Canada, Inc.	100%
Hong Kong	Timeplex Far East Ltd.	100%
England	Timeplex Ltd.	100%
Spain	Integracion de Sistemas Complejos, S.A.	100%
Italy	Convergent Technologies S.r.l.	100%
England	Convergent Technologies (U.K) Ltd.	100%
Germany	Convergent Technologies GmbH	100%
France	Convergent Technologies S.A. R.L.	100%

Domestic Entities

Delaware	Ally Software, Inc.	100%
California	BST International Inc. (Inactive)	100%
Delaware	Burroughs Export Corporation (Inactive)	100%
Delaware	Burroughs Systems Inc.	100%
Delaware	Burroughs Transport Corporation	100%
California	CFI Memories DISC (Inactive)	100%
Delaware	Convergent, Inc.	100%
Delaware	Harrison Credit Group, Inc.	100%
California	Image Products Corporation (Inactive)	100%
California	Information Printing Systems Corporation (Inactive)	100%

Delaware	Joseph & Cogan Associates, Inc.	100%
California	Midwest Systems Corporation (Inactive)	100%
California	M/R Systems Corporation	100%
Delaware	Ramac-Services Corporation	100%
Delaware	Sperry Capital Management Corporation	100%
Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Lease Finance Corporation	100%
Delaware	Sperry Leasing Corporation	100%
Delaware	Sperry Mapper Services, Inc.	100%
Delaware	Sperry Rand Corporation	100%
Delaware	Timeplex, Inc.	100%
New York	UIS Information Systems of New York, Inc.	100%
Delaware	Unisys CAD/CAM, Inc.	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Delaware	Unisys Defense International, Inc.	100%
Delaware	Unisys Defense Systems, Inc.	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys Government Systems, Inc.	100%
Delaware	Unisys Holding Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Unisys Japan, Ltd.	100%
California	Unisys Peripherals DISC Corporation (Inactive)	100%
California	Unisys Peripherals Ink and Chemical Corporation (Inactive)	100%
California	Unisys Peripherals International Corporation (DISC) (Inactive)	100%

California	Unisys Peripherals Video Corporation (Inactive)	100%
Delaware	Unisys Services Corporation	100%
Delaware	Unisys World Trade, Inc.	100%
Delaware	Burroughs Caribbean Ltd. (Inactive)	100%
Delaware	Burroughs Europe-Africa, Inc.	100%
Delaware	Burroughs Mexican Manufacturing, Inc.	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/93

Jurisdiction of Incorporation	Name	Ownership Percentage
Foreign Entities		
Sweden	Burmex Holding Sweden AB	100%
England	Burroughs Machines Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
Japan	Nihon Unisys Ltd.	32.04%
Japan	Old Unisys Kaisha, Ltd.	45.08%
Finland	Oy Unisys Ab	100%
Canada	Paramax Systems Canada Holding Inc.	100%
Germany	Paramax Systems GmbH (Inactive)	100%
Hong Kong	Paramax Systems International (Hong Kong) Ltd.	100%
Colombia	Sperry Colombiana S.A. (Inactive)	100%
New Zealand	Sperry Computer Systems Ltd. (Inactive)	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Australia	Synercom Australia Pty. Ltd.	100%

Sweden	Unisys AB	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Portugal	Unisys (Portugal) - Sistemas de Informacao, S.A.	100%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systeme Gesellschaft m.b.H. (Inactive)	100%
New Zealand	Future Systems Ltd.	100%
Colombia	ROE Industria Colombiana S.A.	100%
Norway	Sperry A/S	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Sweden	Sperry Holding AB (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
England	Sperry Limited	100%
Germany	Sperry Zentrallager Europa GmbH	100%
India	Tata Unisys Ltd.	39.99%
Greece	Trade and Industry Sperry L.L.C.	100%
Canada	Unisys Canada Inc.	100%
Brazil	Unisys Electronics Ltda.	100%
England	Unisys Holdings	100%
Hong Kong	Unisys (Hong Kong) Ltd.	100%
Netherlands	Unisys International Services B.V.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
Switzerland	Unisys Investments, S.A.	100%
Korea	Unisys Korea Ltd.	100%
Malaysia	Unisys (Malaysia) Sdn. Bhd.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%

Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Switzerland	Sperry Rand International Corporation	100%
Poland	UNILOT Sz00	25%
China	UNIMAC Computer Systems Ltd.	50%
Russia	UNIMAS	33.33%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
Norway	Unisys Norge A/S	100%
Austria	Unisys Osterreich Ges.m.b.H.	100%
Denmark	Unisys A/S	100%
Belgium	Unisys Belgium	100%
Germany	Unisys Deuutschland GmbH	100%
Spain	Unisys Espana S.A.	100%
France	Unisys France	100%
Italy	Unisys Italia S.p.A	100%
Netherlands	Unisys Nederland N.V.	100%
Czech Republic	Unisys s.r.o.	45%
Canada	Unisys Finance Canada, Ltd.	100%
Hong Kong	Unisys (Asia) Ltd.	100%
Italy	Tecnologica S.p.A.	100%
Italy	Unisys Finanziaria S.p.A.	100%
Portugal	UNISOFT-Sistemas Informaticos S.A.	100%
Thailand	Siam Unisys, Ltd.	55%
Thailand	Unisys-Thai Holding Company, Ltd.	49%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Philippines	Unisys Synercom Philippines	100%
Canada	Cemcorp International Inc	100%

Spain	Integracion de Sistemas Complejos, S.A.	100%
Brazil	Unisys-Comercio, Importacao e Exportacao Ltda.	100%
Hong Kong	Burroughs Hong Kong (1987) Ltd.	100%
Hong Kong	Sperry (Hong Kong) 1987 Ltd.	100%
Netherlands	Omnicon B.V.	100%
Netherlands	Unihouse B.V.	100%
Netherlands	Unisys Nederland Parts Distribution B.V.	100%
Netherlands	Unisys Europe Finance B.V.	100%
Argentina	Unisys Sudamericana S.A.	100%
Argentina	IDAT, Industria de Alta Tecnologia, S.A.	49%
Norway	Univac A/S	100%
England	BMX Information Systems (UK) Ltd.	100%
England	Unisys International Services Ltd.	100%
England	Unisys Limited	100%
England	Sperry (Ireland) Ltd. (Inactive)	100%
Saudi Arabia	Sperry Arabia Ltd.	49%
Canada	215530-3 Canada Inc.	100%
Canada	Paramax Systems Canada Inc.	100%
Canada	Paramax Systems Ltd.	100%

Domestic Entities

Delaware	Burroughs Systems Inc.	100%
Delaware	Convergent, Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
California	M/R Systems Corporation	100%
Delaware	Paramax Systems Corporation	100%
Delaware	Ramac Services Corporation	100%

Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Rand Corporation	100%
New York	UIS Information Systems of New York, Inc.	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys Government Systems Arabia, Inc.	100%
Delaware	Unisys Government Systems Defense International, Inc.	100%
Delaware	Unisys Government Systems International, Inc.	100%
Delaware	Unisys Government Systems Technology, Inc.	100%
Delaware	Unisys Holding Corporation	100%
Delaware	Unisys Japan, Ltd.	100%
Delaware	Unisys Receivables, Inc.	100%
Delaware	Unisys Services Corporation	100%
Delaware	Unisys TPX, Inc.	100%
Delaware	Unisys Trading Ltd.	100%
Delaware	Unisys World Trade, Inc.	100%
Michigan	Compania Burroughs Mexicana, S.A. (Inactive)	100%
Michigan	Unisys Australia Ltd.	100%
Delaware	Unisys Brazilian Systems, Inc.	100%
Delaware	Unisys (Chile) Corporation	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys-Cyberware, Inc.	50%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%

Delaware	Unisys del Peru Corporation	100%
Delaware	Unisys Overseas Equity, Inc.	100%
Delaware	Unisys Overseas Ltd.	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	Sperry International Capital Corporation	100%
Delaware	Unisys Municipal Credit Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Convergent Business Systems, Inc.	100%
California	Convergent Technologies, Inc.	100%

Unisys Corporation
Subsidiary Listing
Year Ended 12/31/94

Jurisdiction of Incorporation Foreign Entities	Name	Ownership Percentage
Sweden	Burmex Holding Sweden AB	100%
England	Burroughs Machines Ltd.	100%
Bermuda	Galactic Assurance Group Ltd.	100%
Japan	Nihon Unisys Ltd.	32.04%
Japan	Oki Unisys Kaisha, Ltd.	45.08%
Finland	Oy Unisys Ab	100%
Colombia	Sperry Colombiana S.A. (Inactive)	100%
New Zealand	Sperry Computer Systems Ltd. (Inactive)	100%
Sweden	Unisys AB	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Canada	Unisys CSG Canada Holdings Inc.	100%
Australia	Unisys Information Services Australia Pty. Ltd.	100%

Germany	Unisys Information Services GmbH	100%
Portugal	Unisys (Portugal) Sistemas de Informacao, SA	100%
Philippines	Unisys Public Sector Services Corporation	100%
Norway	Burroughs A/S	100%
Austria	Burroughs Computer Systems Gesellschaft m.b.H. (Inactive)	100%
New Zealand	Future Systems Ltd.	100%
Colombia	ROE lndustria Colombiana S.A.	100%
Norway	Sperry A/S	100%
Australia	Sperry Finance Company Pty. Ltd.	100%
Sweden	Sperry Holding AB (Inactive)	100%
Bermuda	Sperry Insurance Company Ltd.	100%
Switzerland	Sperry International Marketing AG	100%
United Kingdom	Sperry Ltd.	100%
Germany	Sperry Zenttrallager Europa GmbH	100%
India	Tata Unisys Ltd.	39.99%
Singapore	Unisys Asia Pacific Pte. Ltd.	100%
Canada	Unisys Canada Inc.	100%
Hong Kong	Unisys China/Hong Kong Ltd.	100%
Mexico	Unisys de Mexico, S.A. de C.V.	100%
Brazil	Unisys Eletronica Ltda.	100%
United Kingdom	Unisys Holdings	100%
Netherlands	Unisys International Services B.V.	100%
Singapore	Unisys International Singapore Pte. Ltd.	100%
Switzerland	Unisys Investments, S.A.	100%
Korea	Unisys Korea Ltd.	100%
Malaysia	Unisys (Malaysia) Sdn. Bhd.	100%

Mauritius	Unisys (Mauritius) Ltd.	100%
New Zealand	Unisys New Zealand Ltd.	100%
Pakistan	Unisys Pakistan (Private) Ltd.	51%
Singapore	Unisys Pte. Ltd.	100%
Switzerland	Unisys (Schweiz) A.G.	100%
Taiwan (ROC)	Unisys (Taiwan) Ltd.	100%
Switzerland	Sperry Rand International Corporation	100%
Poland	UNILOT Sz00	45%
China	UNIMAC Computer Systems Ltd.	50%
Russia	UNIMAS	33.33%
China	Unisys (China) Company Ltd.	100%
Venezuela	Unisys de Venezuela C.A.	100%
England	Unisys Europe-Africa, Ltd.	100%
Norway	Unisys Norge A/S	100%
Austria	Unisys Österreich Ges.m.b.H.	100%
Denmark	Unisys A/S	100%
Belgium	Unisys Belgium	100%
Germany	Unisys Deutschland GmbH	100%
Spain	Unisys Espana S.A.	100%
France	Unisys France	100%
Hungary	Unisys Hungary Ltd.	45%
Italy	Unisys Italia S.p.A.	100%
Netherlands	Unisys Nederland N.V.	100%
Czech Republic	Unisys s.r.o.	100%
Barbados	Sperry Foreign Sales Corporation (Inactive)	100%
Canada	Unisys Finance Canada, Ltd.	100%
Hong Kong	Unisys (Asia) Ltd.	100%
Italy	Tecnologica S.p.A.	100%
Italy	Unisys Finanziaria S.p.A.	100%
Portugal	UNISOFT-Sistemas Informaticos SA	100%

Thailand	Siam Unisys, Ltd.	55%
Thailand	Unisys-Thai Holding Company Ltd.	49%
Zimbabwe	Remington Rand of Central Africa (Private) Ltd. (Inactive)	100%
Singapore	Remington Rand (Malaysia) Ltd. (Inactive)	100%
Philippines	Unisys Synercom Philippines	100%
Canada	Cemcorp International Inc.	100%
New Zealand	Public Record Access New Zealand Ltd.	100%
China	Guangzhou YUNI Computer Software Company Ltd.	51%
China	Shanghai Baoni Corporation Systems Integration	51%
Spain	Integracion de Sistemas Complejos, S.A.	100%
Brazil	Unisys—Comercio, Importacao e Exportacao Ltda.	100%
Hong Kong	Burroughs Hong Kong (1987) Ltd.	100%
Hong Kong	Sperry (Hong Kong) 1987 Ltd.	100%
Netherlands	Omnicon B.V.	100%
Netherlands	Unisys Nederland Parts Distribution B.V.	100%
Netherlands	Unisys Europe Finance B.V.	100%
Argentina	Unisys Sudamericana S.A.	100%
Argentina	IDAT, Industria de Alta Tecnologia, S.A.	49%
Norway	Univac A/S	100%
United Kingdom	BMX Information Systems (UK) Ltd.	100%
United Kingdom	Unisys International Services Ltd.	100%
United Kingdom	Unisys Ltd.	100%
United Kingdom	Unisys Payment Services Ltd.	100%

United Kingdom	Sperry (Ireland) Ltd. (Inactive)	100%
Saudi Arabia	Sperry Arabia Ltd.	49%
Canada	215530-3 Canada Inc.	100%
Canada	Unisys GSG Canada Inc.	100%
Canada	Unisys Systems Ltd.	100%

Domestic Entities

Delaware	Burroughs Systems Inc.	100%
Delaware	Convergent, Inc.	100%
Delaware	Joseph & Cogan Associates, Inc.	100%
California	M/R Systems Corporation	100%
Delaware	Paramax Systems Corporation	100%
Delaware	Ramac Services Corporation	100%
Delaware	Sperry International Services Company, Inc.	100%
Delaware	Sperry International Trade, Inc.	100%
Delaware	Sperry Rand Corporation	100%
New York	UIS Information Systems of New York, Inc	100%
Delaware	Unisys China Investments, Inc.	100%
Delaware	Unisys China Services, Inc.	100%
Delaware	Unisys Defense International, Inc.	100%
Michigan	Unisys Finance Corporation	100%
Delaware	Unisys Government Systems Arabia, Inc.	100%
Delaware	Unisys Government Systems International, Inc.	100%
Delaware	Unisys Government Systems Technology, Inc.	100%
Delaware	Unisys Holding Corporation	100%
Delaware	Unisys Japan, Ltd.	100%
Delaware	Unisys Receivables, Inc.	100%
Delaware	Unisys Services Corporation	100%

Delaware	Unisys TPX, Inc.	100%
Delaware	Unisys Trading Ltd.	100%
Delaware	Unisys World Trade, Inc.	100%
Delaware	B.V. Unisys Acquisition Corporation	100%
Michigan	Unisys Australia Ltd.'	100%
Delaware	Unisys (Chile) Corporation	100%
Delaware	Unisys China Ltd.	100%
Delaware	Unisys-Cyberware, Inc.	50%
Delaware	Unisys de Centro America, S.A.	100%
Delaware	Unisys de Colombia, S.A.	100%
Delaware	Unisys del Peru Corporation	100%
Delaware	Unisys Overseas Equity, Inc.	100%
Delaware	Unisys Overseas Ltd.	100%
Michigan	Unisys Puerto Rico, Inc.	100%
Delaware	Unisys Software, Inc.	100%
Michigan	Unisys Sudamericana Ltda.	100%
Delaware	Sperry International Capital Corporation	100%
Delaware	Unisys Municipal Credit Corporation	100%
Delaware	Unisys International Company	100%
Delaware	Convergent Business Systems, Inc.	100%
California	Convergent Technologies, Inc.	100%

	NW Reported Separate Co	NW Settled Consolidated	ANI Reported No Dividends	ANI Settled With Dividends	CSV Reported	CSV Settled
	A	B	C	D	E	F
1994	976,212,500	2,604,500,000	-336,610,425	-269,952,688	49,631,447	67,637,252
1993	1,010,762,500	2,695,500,000	-548,983,422	-484,743,746	61,264,337	123,546,511
1992	841,487,500	2,244,100,000	-608,887,023	-533,017,143	45,458,838	55,544,065
1991	755,350,000	2,014,400,000	-542,823,479	-469,076,009	27,897,342	47,136,861
1990	1,306,925,000	3,485,400,000	-485,887,822	-432,784,248	70,343,931	94,524,658
1989	1,248,427,254	3,329,406,011	-235,643,432	-122,294,570	63,370,167	80,267,630
1988	1,858,047,500	4,954,900,000	-16,290,451	99,006,451	161,118,595	183,578,873
1987	1,704,212,500	4,544,700,000	-211,053,608	80,054,000	109,240,324	139,785,589
1986	1,435,612,500	3,828,300,000	-45,874,192	78,476,160	58,647,158	92,698,451
1985	742,737,720	1,980,633,920	-18,093,966	106,211,296	46,288,679	56,150,751
1984	861,525,000	2,297,400,000	362,805,886	417,272,596	37,786,689	52,901,283
3/86	*1,552,063,216	3,066,000,000	-15,675,634	-12,465,731	41,946,329	51,155,827
3/85	*1,718,570,968	3,001,100,000	36,060,596	70,236,891	47,096,363	61,830,543

*Sperry's return showed consolidated net worth, not the separate company net worth reflected in this column.

Attachment B

Appendix A

	Year	Unisys Corporation Pennsylvania Property	Unisys Subsidiaries Pennsylvania Property	Unisys & Subs Pennsylvania Property
	1994	98,587,653	33,088,664	131,676,317
	1993	111,535,422	66,288,746	177,824,168
•	1992	171,539,555	100,977,045	272,516,600
•	1991	257,111,124	70,282,542	327,393,666
	1990	347,604,561	56,168,495	403,773,056
•	1989	306,475,809	39,883,858	346,359,667
	1988	385,125,083	11,390,913	396,515,996
	1987	289,680,783	12,837,476	302,518,259
	1986	42,265,923	44,302,906	86,568,829
	1985	50,072,543	42,564,272	92,636,815
	1984	66,492,233	21,595,018	88,087,251
	3/86	143,019,700	8,796,841	151,816,541
	3/85	126, 860,304	12,326,336	139,186,640

	Year	Unisys Corporation Everywhere Property	Unisys Subsidiaries Everywhere Property	Unisys Corporation Worldwide Property
	1994	2,900,886,197	2,223,456,899	5,124,343,096
	1993	2,468,170,365	2,483,264,747	4,951,435,112
•	1992	2,510,006,557	2,705,232,651	5,215,239,208
•	1991	3,436,049,271	2,762,500,985	6,198,550,256
	1990	4,569,097,546	2,781,303,174	7,350,400,720
•	1989	4,994,280,451	2,310,289,813	7,304,570,264
	1988	5,130,558,328	1,187,711,456	6,318,269,784
	1987	4,714,021,513	1,790,333,367	6,504,354,880
	1986	2,959,020,480	2,374,979,520	5,334,000,000
	1985	2,510,370,671	2,589,929,329	5,100,300,000
	1984	2,466,947,142	2,356,702,858	4,823,650,000
	3/86	3,741,305,214	1,375,219,092	5,116,424,306
	3/85	3,677,069,148	1,038,293,450	4,715,362,598

•1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment D

Appendix A

Year	Unisys Corporation Pennsylvania Receipts	Unisys Subsidiaries Pennsylvania Receipts	Unisys & Subs Pennsylvania Receipts
1994	111,322,300	3,497,133	114,819,433
1993	211,594,566	65,977,601	277,572,167
• 1992	87,851,530	375,410,662	463,262,192
• 1991	151,049,531	67,936,074	218,985,605
1990	221,628,036	90,903,604	312,531,640
• 1989	98,019,749	105,432,631	203,452,380
1988	230,377,270	16,325,504	246,702,774
1987	196,279,166	12,833,565	209,112,731
1986	151,905,061	33,470,530	185,375,591
1985	33,475,195	31,986,300	65,461,495
1984	108,666,639	31,256,089	139,922,728
3/86	164,203,288	11,770,376	175,793,664
3/85	168,129,098	11,742,407	179,871,505

Year	Unisys Corporation Pennsylvania Receipts	Unisys Subsidiaries Pennsylvania Receipts	Unisys & Subs Pennsylvania Receipts
1994	5,673,180,596	2,251,661,671	7,924,842,267
1993	3,344,768,455	5,130,661,312	8,475,429,767
• 1992	2,932,462,519	7,646,333,123	10,578,795,642
• 1991	3,247,442,302	6,774,059,360	10,021,501,662
1990	6,358,266,579	5,006,705,346	11,364,971,925
• 1989	7,003,817,933	4,214,402,855	11,218,220,788
1988	8,921,060,499	1,755,931,964	10,676,992,463
1987	5,781,533,329	4,813,142,962	10,594,676,291
1986	3,309,712,461	4,994,764,722	8,304,477,183
1985	2,403,952,815	2,842,740,703	5,246,693,518
1984	2,856,708,229	2,208,354,916	5,065,063,145
3/86	5,323,574,906	1,204,743,313	6,528,318,219
3/85	4,941,482,128	1,414,716,864	6,356,198,992

• 1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment E

Appendix A

Year	Unisys Corporation Pennsylvania Payroll	Unisys Subsidiaries Pennsylvania Payroll	Unisys & Subs Pennsylvania Payroll
1994	278,756,505	0	278,756,505
1993	262,238,463	43,495,049	305,733,512
• 1992	92,234,018	72,860,040	165,094,058
• 1991	105,559,111	6,940,241	112,499,352
1990	253,131,024	8,707,572	261,838,596
• 1989	306,422,585	9,929,572	316,352,157
1988	348,313,729	7,219,180	355,532,909
1987	238,706,308	3,531,578	242,237,886
1986	115,366,766	8,427,781	123,794,547
1985	91,754,127	7,905,766	99,659,893
1984	75,807,409	5,839,541	81,646,950
3/86	126,840,292	0	126,840,292
3/85	98,646,510	0	98,646,510

Year	Unisys Corporation Pennsylvania Payroll	Unisys Subsidiaries Pennsylvania Payroll	Unisys & Subs Pennsylvania Payroll
1994	1,811,988,747	670,805,507	2,482,794,254
1993	1,015,475,227	1,686,008,791	2,701,484,018
• 1992	924,913,756	1,575,679,097	2,500,592,853
• 1991	1,602,538,829	1,511,219,547	3,113,758,376
1990	2,387,056,004	925,615,673	3,312,671,677
• 1989	2,607,309,190	1,040,359,308	3,647,668,498
1988	2,666,937,052	584,294,919	3,251,231,971
1987	2,342,587,699	791,987,638	3,134,575,337
1986	2,746,699,678	293,183,104	3,039,882,782
1985	960,428,864	730,671,136	1,691,100,000
1984	909,985,667	730,159,333	1,640,145,000
3/86	1,968,348,891	468,019,298	2,436,368,189
3/85	1,775,994,627	436,147,319	2,212,141,946

• 1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment F

Appendix A

Dividends Paid to Unisys

Year	From Domestic Corporations	From Foreign Corporations	Total
1994	$17,250,511	$0	$17,240,511
1993	$10,051,713	$2,436,207	$12,487,920
1992	$14,342,655	$2,144,137	$16,486,792
1991	$141,262,345	$3,548,072	$144,810,417
1990	$53,863,872	$5,172,822	$59,036,694
1989	$0	$0	$0
1988	$0	$97,562,834	$97,562,834
1987	$15,328,544	$21,215,492	$36,544,036
1986	$0	$111,658,434	$111,658,434
1985	$137,023,759	$9,242,807	$12,337,807
3/86	77,000	108,703,955	108,780,955
3/85	45,500	142,541,588	142,587,088

Attachment G

Appendix A

Year	Column A - Apportionment Fraction Without Subsidiaries	Column B - Apportionment Fraction With Subsidiaries	(Column A-Column B) Divided By Column B, Expressed As A Percentage	Column A-Column B Expressed As A Percentage	
1994	0.069149	0.050820	36.0665%	1.8329%	
1993	0.122231	0.060612	101.6614%	6.1619%	
*1992	0.066007	0.054022	22.1854%	1.1985%	
*1991	0.062404	0.036933	68.9654%	2.5471%	
1990	0.072326	0.053824	34.3750%	1.8502%	
*1989	0.064295	0.050760	26.6647%	1.3535%	
1988	0.077164	0.065072	18.5825%	1.2092%	
1987	0.065766	0.047842	37.4650%	1.7924%	
1986	0.050144	0.026425	89.7597%	2.3719%	
1985	0.043135	0.029857	44.4720%	1.3278%	
1984	0.043133	0.031889	35.2598%	1.1244%	
Average Subtotal Unisys			46.8598%	2.0700%	
3/86	0.044493	0.036220	22.84%	.871%	
3/85	0.041356	0.034137	21.15%	.7219%	
Average Subtotal Sperry			21.995%	.79645%	
Average, Total			44.5789%	1.9205%	

*1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment H

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 151 F.R. 1991; No. 201 F.R. 1993; No. 202 F.R. 1993

UNISYS CORPORATION,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

SUPPLEMENTAL STIPULATION OF FACTS

Kevin A. Moury, Esquire, Deputy Attorney General, counsel for the Commonwealth of Pennsylvania, and Joseph C. Bright, Esquire, counsel for Unisys Corporation hereby stipulate for the purposes of this appeal that:

1. Attachments B, D, E, F, and H hereto are hereby substituted respectively for the same lettered attachments to the Stipulation of Facts filed December 30, 1997. Figures shown for the tax years ending March 31, 1985 and March 31, 1986 are for Sperry Corporation.

_____ February __, 1998

Kevin A. Moury

_____ February __, 1998

Joseph C. Bright

	NW Reported Separate Co A	NW Settled Consolidated B	ANI Reported No Dividends C	ANI Settled With Dividends D	CSV Reported E	CSV Settled F
1994	976,212,500	2,604,500,000	-336,610,425	-269,952,688	49,631,447	67,637,252
1993	1,010,762,500	2,695,500,000	-548,983,422	-484,743,746	61,264,337	123,546,511
1992	841,487,500	2,244,100,000	-608,887,023	-533,017,143	45,458,838	55,544,065
1991	755,350,000	2,014,400,000	-542,823,479	-469,076,009	27,897,342	47,136,861
1990	1,306,925,000	3,485,400,000	-485,887,822	-432,784,248	70,343,931	94,524,658
1989	1,248,427,254	3,329,406,011	-235,643,432	-122,294,570	63,370,167	80,267,630
1988	1,858,047,500	4,954,900,000	-16,290,451	99,006,451	161,118,595	183,578,873
1987	1,704,212,500	4,544,700,000	-211,053,608	80,054,000	109,240,324	139,785,589
1986	1,435,612,500	3,828,300,000	-45,874,192	78,476,160	58,647,158	92,698,451
1985	742,737,720	1,980,633,920	-18,093,966	106,211,296	46,288,679	56,150,751
1984	861,525,000	2,297,400,000	362,805,886	417,272,596	37,786,689	52,901,283
3/86	*1,552,063,216	3,066,000,000	-15,675,634	-12,465,731	41,946,329	51,155,827
3/85	*1,718,570,968	3,001,100,000	36,060,596	70,236,891	47,096,363	61,830,543

* Sperry's return showed consolidated net worth, not the separate company net worth reflected in this column.

Attachment B

Appendix A

Year	Unisys Corporation Pennsylvania Property	Unisys Subsidiaries Pennsylvania Property	Unisys & Subs Pennsylvania Property
1994	98,587,653	33,088,664	131,676,317
1993	111,535,422	66,288,746	177,824,168
* 1992	171,539,555	100,977,045	272,516,600
* 1991	257,111,124	70,282,542	327,393,666
1990	347,604,561	56,168,495	403,773,056
* 1989	306,475,809	39,883,858	346,359,667
1988	385,125,083	11,390,913	396,515,996
1987	289,680,783	12,837,476	302,518,259
1986	42,265,923	44,302,906	86,568,829
1985	50,072,543	42,564,272	92,636,815
1984	66,492,233	21,595,018	88,087,251
3/86	143,019,700	8,796,841	151,816,541
3/85	126,860,304	12,326,336	139,186,640

Year	Unisys Corporation Everywhere Property	Unisys Subsidiaries Everywhere Property	Unisys Corporation Worldwide Property
1994	2,900,886,197	2,223,456,899	5,124,343,096
1993	2,468,170,365	2,483,264,747	4,951,435,112
* 1992	2,510,006,557	2,705,232,651	5,215,239,208
* 1991	3,436,049,271	2,762,500,985	6,198,550,256
1990	4,569,097,546	2,781,303,174	7,350,400,720
* 1989	4,994,280,451	2,310,289,813	7,304,570,264
1988	5,130,558,328	1,187,711,456	6,318,269,784
1987	4,714,021,513	1,790,333,367	6,504,354,880
1986	2,959,020,480	2,374,979,520	5,334,000,000
1985	2,510,370,671	2,589,929,329	5,100,300,000
1984	2,466,947,142	2,356,702,858	4,823,650,000
3/86	3,741,305,214	1,375,219,092	5,116,424,306
3/85	3,677,069,148	1,038,293,450	4,715,362,598

*1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment D

Appendix A

	Year	Unisys Corporation Pennsylvania Receipts	Unisys Subsidiaries Pennsylvania Receipts	Unisys & Subs Pennsylvania Receipts
	1994	111,322,300	3,497,133	114,819,433
	1993	211,594,566	65,977,601	277,572,167
•	1992	87,851,530	375,410,662	463,262,192
•	1991	151,049,531	67,936,074	218,985,605
	1990	221,628,036	90,903,604	312,531,640
•	1989	98,019,749	105,432,631	203,452,380
	1988	230,377,270	16,325,504	246,702,774
	1987	196,279,166	12,833,565	209,112,731
	1986	151,905,061	33,470,530	185,375,591
	1985	33,475,195	31,986,300	65,461,495
	1984	108,666,639	31,256,089	139,922,728
	3/86	164,203,288	11,770,376	175,793,664
	3/85	168,129,098	11,742,407	179,871,505

	Year	Unisys Corporation Pennsylvania Receipts	Unisys Subsidiaries Pennsylvania Receipts	Unisys & Subs Pennsylvania Receipts
	1994	5,673,180,596	2,251,661,671	7,924,842,267
	1993	3,344,768,455	5,130,661,312	8,475,429,767
•	1992	2,932,462,519	7,646,333,123	10,578,795,642
•	1991	3,247,442,302	6,774,059,360	10,021,501,662
	1990	6,358,266,579	5,006,705,346	11,364,971,925
•	1989	7,003,817,933	4,214,402,855	11,218,220,788
	1988	8,921,060,499	1,755,931,964	10,676,992,463
	1987	5,781,533,329	4,813,142,962	10,594,676,291
	1986	3,309,712,461	4,994,764,722	8,304,477,183
	1985	2,403,952,815	2,842,740,703	5,246,693,518
	1984	2,856,708,229	2,208,354,916	5,065,063,145
	3/86	5,323,574,906	1,204,743,313	6,528,318,219
	3/85	4,941,482,128	1,414,716,864	6,356,198,992

• 1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment E

Appendix A

Year	Unisys Corporation Pennsylvania Payroll	Unisys Subsidiaries Pennsylvania Payroll	Unisys & Subs Pennsylvania Payroll
1994	278,756,505	0	278,756,505
1993	262,238,463	43,495,049	305,733,512
° 1992	92,234,018	72,860,040	165,094,058
° 1991	105,559,111	6,940,241	112,499,352
1990	253,131,024	8,707,572	261,838,596
° 1989	306,422,585	9,929,572	316,352,157
1988	348,313,729	7,219,180	355,532,909
1987	238,706,308	3,531,578	242,237,886
1986	115,366,766	8,427,781	123,794,547
1985	91,754,127	7,905,766	99,659,893
1984	75,807,409	5,839,541	81,646,950
3/86	126,840,292	0	126,840,292
3/85	98,646,510	0	98,646,510

Year	Unisys Corporation Pennsylvania Payroll	Unisys Subsidiaries Pennsylvania Payroll	Unisys & Subs Pennsylvania Payroll
1994	1,811,988,747	670,805,507	2,482,794,254
1993	1,015,475,227	1,686,008,791	2,701,484,018
° 1992	924,913,756	1,575,679,097	2,500,592,853
° 1991	1,602,538,829	1,511,219,547	3,113,758,376
1990	2,387,056,004	925,615,673	3,312,671,677
° 1989	2,607,309,190	1,040,359,308	3,647,668,498
1988	2,666,937,052	584,294,919	3,251,231,971
1987	2,342,587,699	791,987,638	3,134,575,337
1986	2,746,699,678	293,183,104	3,039,882,782
1985	960,428,864	730,671,136	1,691,100,000
1984	909,985,667	730,159,333	1,640,145,000
3/86	1,968,348,891	468,019,298	2,436,368,189
3/85	1,775,994,627	436,147,319	2,212,141,946

° 1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment F

Appendix A

Dividends Paid to Unisys

Year	From Domestic Corporations	From Foreign Corporations	Total
1994	$17,250,511	$0	$17,240,511
1993	$10,051,713	$2,436,207	$12,487,920
1992	$14,342,655	$2,144,137	$16,486,792
1991	$141,262,345	$3,548,072	$144,810,417
1990	$53,863,872	$5,172,822	$59,036,694
1989	$0	$0	$0
1988	$0	$97,562,834	$97,562,834
1987	$15,328,544	$21,215,492	$36,544,036
1986	$0	$111,658,434	$111,658,434
1985	$137,023,759	$9,242,807	$12,337,807
3/86	77,000	108,703,955	108,780,955
3/85	45,500	142,541,588	142,587,088

Attachment G

Appendix A

Year	Column A Apportionment Fraction Without Subsidiaries	Column B Apportionment Fraction With Subsidiaries	(Column A-Column B) Divided By Column B, Expressed As A Percentage	Column A-Column B Expressed As A Percentage
1994	0.069149	0.050820	36.0665%	1.8329%
1993	0.122231	0.060612	101.6614%	6.1619%
*1992	0.066007	0.054022	22.1854%	1.1985%
*1991	0.062404	0.036933	68.9654%	2.5471%
1990	0.072326	0.053824	34.3750%	1.8502%
*1989	0.064295	0.050760	26.6647%	1.3535%
1988	0.077164	0.065072	18.5825%	1.2092%
1987	0.065766	0.047842	37.4650%	1.7924%
1986	0.050144	0.026425	89.7597%	2.3719%
1985	0.043135	0.029857	44.4720%	1.3278%
1984	0.043133	0.031889	35.2598%	1.1244%
Average, Subtotal Unisys			46.8598%	2.0700%
3/86	0.044493	0.036220	22.84%	.871%
3/85	0.041356	0.034137	21.15%	.7219.%
Average, Subtotal, Sperrry			21.995%	.79645%
Average, Total			44.5789%	1.9205%

* 1989, 1991 & 1992 have been resettled by the Board of Appeals. Petition pending before Board of Finance and Revenue.

Attachment H

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 201 F.R. 1993; NO. 202 F.R. 1993; NO. 151 F.R. 1991

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

PER CURIAM ORDER

NOW, April 13, 1999, the parties having filed a stipulation to waive briefs and argument on exceptions, respondent's exceptions, and petitioner's exceptions are overruled and our prior Order of March 8, 1999, is hereby entered as the final order in this case.

CERTIFIED FROM THE
RECORD
AND ORDER EXIT
APR. 14, 1999
/s/C.T. Hostutler
Deputy Prothonotary—Chief Clerk

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 151 F.R. 1991

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

No. 201 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

No. 202 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

Argued: May 6, 1998

BEFORE: HONORABLE JAMES GARDNER COLINS,. President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

OPINION BY JUDGE LEADBETTER

FILED: March 8, 1999

Unisys Corporation petitions for review of three orders of the Board of Finance and Revenue (Board) which affirmed the Department of Revenue's (Department) settlement of Unisys' 1986 franchise tax and Sperry Corporation's[1] 1985 and 1986 franchise tax. The Pennsylvania franchise tax, which is imposed on the capital stock value of every out of state cor-

[1] Unisys is the successor by merger to Sperry Corporation.

poration that does business within Pennsylvania, is designed to tax business activity conducted within the Commonwealth only. Section 602(b) of the Tax Reform Code of 1971 (Tax Code), Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. § 7602(b). In calculating the franchise tax, the reporting corporation must first calculate its capital stock value ["actual value"] by a statutory formula based upon the corporation's net worth,[2] which includes the net worth of any entity in which the corporation owns common stock, and the corporation's average net income, which includes dividends received from investee corporations.[3] Section 601(a) of the Tax Code, 72 P.S. § 7601(a); 61 Pa. Code §§ 155.26, 155.27. After determining the capital stock value, the corporation must arrive at taxable value, 72 P.S. § 7602(b), by applying an apportionment factor to the actual value.

Since a state may not constitutionally tax value earned outside its borders, the Tax Code sets forth two methods by which a corporation may apportion the value of its capital stock attributable to business activities within and without

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[2] A corporation's net worth is calculated as follows:

(a) Net worth is the sum of the taxpayer's issued and outstanding capital stock, surplus and undivided profits as per books set forth on the income tax return filed by the taxpayer with the Federal government, or if no return is made, as would have been set forth had a return been made.

(b) In the case of a taxpayer which has investments in the common stock of another corporation, net worth is the consolidated net worth of the taxpayer computed in accordance with generally accepted accounting principles. Book value for investments of stock of other corporations includes original cost plus the investor's share of the investee's earnings or losses. For the purpose of this subsection, investments in the common stock of another corporation means investments which shall be accounted for using the equity method of accounting or which shall be consolidated under generally accepted accounting principles.

61 Pa. Code § 155.27(a) and (b).

[3] Specifically, actual value for tax years 1985 and 1986 is computed pursuant to the following algebraic formula:

(.5α (average net income / .095 + (.75)(net worth))) - $100,000

Section 601 (a) of the Tax Code, 72 P.S. § 7601(a).

the Commonwealth, namely, the single-factor method[4] and the three-factor method. The choice of method is left to the taxpayer.[5]

The three-factor apportionment formula averages three fractions—property, payroll and sales—to determine the taxable portion of a foreign corporation's capital stock value:

$$\frac{\text{Property in PA}}{\text{Property everywhere}} + \frac{\text{Payroll in PA}}{\text{Payroll everywhere}} + \frac{\text{Sales in PA}}{\text{Sales everywhere}} \div 3 = \text{Apportionment factor}$$

(Actual value) X (Apportionment factor) X (10 mills) = Tax due

72 P.S. § 7602(b)(1). As consistently interpreted and applied by the Department, the property, payroll and sales figures

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[4] The single-factor method, also known as the single-fraction method, is not applicable here. Under the single-factor method, the tax due is calculated by use of the following formula:

$$\frac{\text{Total assets minus exempt assets}}{\text{Total assets}} \text{ X (Actual value) X (10 mills) = Tax due}$$

Exempt assets include real and tangible personal property located outside Pennsylvania and certain intangible assets. Act of April 20, 1927, P.L. 311, § 1, *as amended*, 72 P.S. § 1894; Act of June 22, 1931, P.L. 685, § 1, *as amended*, 72 P.S. § 1896; 61 Pa. Code § 155.10.

[5] Under the original statutory scheme, the single-factor formula applied only to the capital stock tax on domestic corporations and the three-factor formula applied only to the franchise tax on foreign corporations. By amendment in 1967, domestic corporations were given the option to calculate their taxes by the franchise tax formula. Then, in *Gilbert Assoc., Inc. v. Commonwealth*, 498 Pa. 514, 447 A.2d 944 (1982), our supreme court held that foreign corporations, like domestic corporations, must be afforded the option of utilizing either the three-factor or the single-fraction method.

The Department makes the argument that the right to elect the single-factor formula ameliorates any alleged deficiency in the three-factor formula, making relief unnecessary. However, the cases cited for this proposition, *Commonwealth v. After Six, Inc.*, 489 Pa. 69, 413 A.2d 1017 (1980) and *Quality Markets, Inc. v. Commonwealth*, 514 A.2d 228 (1986), *aff'd per curiam*, 514 Pa. 586, 526 A.2d 357 (1987), presuppose the existence of at least one valid formula. These cases hold that when a taxpayer abjures the formula designed for it and voluntarily elects the other, it may not complain that the formula it chose is unconstitutional as applied. However, in *Quality Markets*, we made clear that the single-factor formula would be unconstitutional if *involuntarily* applied to out of state corporations like Unisys. We agree with Unisys that the right to choose between two infirm formulas would not cure the deficiency in either.

that comprise the three fractions represent only the property, payroll and sales of the taxpayer itself, and not of the taxpayer's subsidiaries. Thus, under this method, while the net worth of and dividends paid by certain subsidiaries of a corporation are included in the corporation's actual value, the property, payroll and sales of those subsidiaries are not considered in the apportionment formula.

Unisys, a Delaware corporation with its principal office in Blue Bell, Pennsylvania, does business in all states of the United States. During the tax years at issue, Unisys owned, directly or indirectly, the stock of more than 100 domestic and foreign subsidiaries doing business in more than 100 countries around the world. In the franchise tax returns at issue, Unisys reported its average net income on a separate company, unconsolidated basis and did not include as income dividends it received from subsidiaries or other investee corporations. Unisys likewise reported its net worth on a separate company, unconsolidated basis and elected to apportion its capital stock value using the three-factor formula, rather than the single-factor asset apportionment fraction. In settling Unisys' franchise tax for the applicable years, the Department increased the amount reported by Unisys as net worth to include the value of Unisys' investments in its subsidiaries and increased the amount reported as average net income by adding the amount of dividends paid to Unisys by its subsidiaries and investee corporations. The Department calculated Unisys' property, payroll and sales apportionment factors on a separate company basis, that is, the factors included only the property, payroll and sales of Unisys itself and not the property, payroll and sales of its subsidiaries. Unisys appealed the Department's settlements, requesting refunds. The Board affirmed the Department's settlements and denied Unisys'

refund requests. This appeal followed.[6] The question presented is whether the interstate commerce and due process clauses of the United States Constitution require the Commonwealth to include property, payroll and sales of subsidiaries in the three-factor apportionment formula and, if not, whether the Pennsylvania statutory scheme mandates administrative relief.[7]

The commerce clause prohibits a state from taxing value earned outside its borders. Where the value attributable to a particular location is not capable of precise definition, the state's method of determining its share of total value is tested by the requirements of due process. Thus, although the requirements of the commerce clause and due process are distinct—the former imposing a substantive limitation upon the state's power to tax and the latter regulating the procedures by which the states may comply with that substantive law—they are closely interrelated. As a practical matter, if the method used to apportion total income between in state (taxable) and out of state (non-taxable) components is fair, the substantive requirements of the commerce clause will ordinarily be met. Hence, most cases analyze these separate constitutional requirements jointly, focusing primarily on the due process issue. As the court noted in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the interstate commerce clause "has not in practice required much in addition to the requirement of fair apportionment." *Id.* at 171.

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[6] In appeals from decisions of the Board of Finance and Revenue, we have the broadest scope of review because the Commonwealth Court functions as a trial court, even though such cases are heard in our appellate jurisdiction. *Norris v. Commonwealth*, 625 A.2d 179, 182 (Pa. Cmwlth. 1993).

[7] Unisys also states in passing that the three-factor apportionment formula, as applied to it, violates the Due Process and Uniformity Clauses of the Pennsylvania Constitution, as well as Sections 401 and 601 of the Tax Code, 72 P.S. §§ 7401 and 7601. We find these claims devoid of merit.

In the case of a multi-state or multi-national company, the Supreme Court has noted that "arriving at precise territorial allocations of value is often an elusive goal." *Id.* at 164. As a result, states must often resort to the use of formulas based upon more readily ascertainable measures of the corporation's activities within and without the state in order to apportion the taxes. The rationale which provides the constitutional predicate for such apportionment is the notion of the "unitary business enterprise," i.e., an enterprise which carries out distinct multijurisdictional activities resulting in ultimate profit or value derived from the entire business operation. As the court noted in *Container*:

> The unitary business formula apportionment method rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one . . . party, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.

Id. at 165. Further, "[t]he functional meaning of [the unitary business enterprise] requirement is that there be some sharing or exchange of value not capable of precise identification or measurement . . . which renders formula apportionment a reasonable method of taxation." *Id.* at 166. In *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), the court made clear that this is a functional concept which disregards corporate formalities:

> So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business.

Id. at 440.

In addition to the requirement that the business must be a unitary enterprise before its total profit or value is subject to tax based upon an apportionment formula, the due process clause also requires that any such formula be fair. Initially, we note that the Supreme Court has repeatedly upheld the constitutionality of the three-factor apportionment formula. "Indeed," the court noted in *Container,* "not only has the three-factor formula met our approval, but it has become . . . something of a benchmark against which other apportionment formulas are judged." 463 U.S. at 170. Unisys' challenge, however, lies not with the formula itself, but with the Department's use in the formula of payroll, property, and sales data of only the parent corporation. The essence of Unisys' argument on appeal is that it is fundamentally unfair for the Department to include as income the dividends Unisys received from its subsidiaries and as net worth the value of its investments in the subsidiaries when calculating the actual value of the corporation, but not include its subsidiaries' property, payroll and sales in the apportionment formula.

Since the purpose of the formula is to apportion the value of the unitary business enterprise among different jurisdictions, it can hardly be subject to dispute that an apportionment formula which includes data from the entire enterprise will yield a more accurate result than a formula based solely upon the parent corporation's operations. That is not the question before this court, however, but rather whether this approach is constitutionally mandated. Although never addressed by the full court,[8] an affirmative answer was urged by Justice Stevens in his dissent in *Mobil Oil Corp.*:

> Either Mobil's worldwide "petroleum enterprise," . . . is all part of one unitary business, or it is not; if it is,

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[8] The court in *Mobil* found that the appellant had "disclaimed any dispute with the accuracy or fairness of Vermont's apportionment formula," 445 U.S. at 434, and thus did not address the issue raised sua sponte by Justice Stevens.

> Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used its apportionment methodology artificially to multiply its share of Mobil's 1970 taxable income.

445 U.S. at 449. The gist of the issue presented—whether the data used to determine the total apportionable business value subject to tax and the apportionment factors must be drawn from the same universe—has been addressed, however, by several state courts. These courts have reached different results based upon their analyses of the varying tax structures and business enterprises under review, but they have consistently eschewed the sort of per se or "bright line" test urged by Unisys in favor of the traditional due process analysis. *See, e.g., NCR Corp. v. Commissioner of Revenue,* 438 N.W.2d 86 (Minn. 1989), *cert. denied,* 493 U.S. 848 (1989); *E.I. DuPont deNemours & Co. v. State Tax Assessor,* 675 A.2d 82, 88-91 (Me. 1996); *American Tel. and Tel. Co. v. Department of Revenue,* 422 N.W.2d 629, 636-37 (Wis. App. 1988).

In analyzing whether an apportionment formula complies with due process, the United States Supreme Court has developed a two-part test. The first prong of this test (sometimes referred to as "internal consistency") seeks to determine whether, *on its face,* the formula is reasonably calculated to reach only the profits earned within the state, i.e., is not inherently arbitrary. This standard will be met where the formula, "if applied by every jurisdiction . . . would result in no more than all of the unitary business' income being taxed." *Container,* 463 U.S. at 169. If this test is met, the formula will be disturbed only "when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' or has 'led to a grossly distorted result.' " *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 274 (1978),

quoting Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123, 135 (1931) and *Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n,* 390 U.S. 317, 326 (1968) [citations omitted]. This latter standard, which looks to the practical effect of the formula, is sometimes characterized as "external consistency." It is upon the external consistency test that Unisys bases this appeal.[9] We conclude that Unisys has not met its burden under the standard set forth above.

In *Hans Rees' Sons,* a taxpayer corporation challenged the constitutionality of North Carolina's corporate income tax apportionment method, the single-factor method.[10] The foreign corporation demonstrated that, while approximately 80% of the taxpayer's income was allocated to North Carolina under the single-factor method, less than 22% of the corporation's income actually had its source in the corporation's operations within North Carolina. 283 U.S. at 134. As a result, the taxes assessed pursuant to the formula were more than three times that which was factually justified. Under these circumstances, the Court held unconstitutional the application of the single-factor apportionment method to the corporation there, stating that:

> [T]he statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State.

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[9] Unisys makes a passing argument that the tax is internally inconsistent based upon the decision in *Tambrands, Inc. v. State Tax Assessor,* 595 A.2d 1039 (Me. 1991). However, as Unisys concedes, *Tambrands* has been overruled. *E.I. DuPont deNemours & Co.,* 675 A.2d at 88-89. For the same reasons *Tambrands* was criticized and ultimately abandoned, we reject Unisys' arguments in this regard.

[10] North Carolina's single-factor method was based entirely on ownership of tangible property.

> In this view, the taxes as laid were beyond the State's authority.

Id. at 135-36. Thus, a more than 250% difference between an assessment calculated under a state's apportionment formula and the amount of income actually attributable to a corporation's operations carried on within a state is outside the allowable margin of error, and therefore offends due process.

Similarly, the court, in *Norfolk & Western Railway*, held that the state of Missouri violated due process in its rigid application of a corporate tax on the value of railroad rolling stock. Because of the mobility of rolling stock, the tax was calculated by multiplying the fraction derived from comparing the number of miles of track in Missouri to the total number of miles of track in all states by the total value of all the company's rolling stock. The Railway produced evidence of the actual value of its rolling stock usually employed both within and outside Missouri. This evidence showed that while the percentage of the company's *track* located in Missouri was over 8%, the actual value of the company's *rolling stock* located within the state was only approximately 3%.[11] The Railway argued that calculating the tax based on the amount of track grossly distorted the measurement of the value of the business carried on within Missouri. The court agreed, stating:

> Our decisions recognize the practical difficulties involved and do not require any close correspondence between the result of computations using the mileage formula and the value of property actually located in the State, but our cases certainly forbid an unexplained discrepancy as gross as that in this case. Such discrepancy

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[11] 2.71% measured by number of units, and 3.16% measured by cost less depreciation value. 390 U.S. at 327.

> certainly means that the impact of the state tax is not confined to intrastate property even within the broad tolerance permitted.

390 U.S. at 327. Thus, a 166% difference in tax due under a state's apportionment formula and under a formula using actual values is also outside the permissible margin of error.

In contrast, the court in *Container Corp.* concluded that a 14% difference between the application of the three-factor apportionment formula and an alternative formula proposed by the corporation was not sufficient to prove that the state of California was taxing extraterritorial value.[12] The court noted:

> Of course, even the three-factor formula is necessarily imperfect. But we have seen no evidence demonstrating that the margin of error (systematic or not) inherent in the three-factor formula is greater than the margin of error (systematic or not) inherent in the sort of separate accounting urged upon us by appellant. Indeed, it would be difficult to come to such a conclusion on the basis of figures in this case: for all of appellant's statistics showing allegedly enormous distortions caused by the three-factor formula, the tables . . . reveal that the percentage increase . . . comes to approximately 14%, a far cry from the more than 250% difference which led us to strike down the state tax in Hans Rees' Sons, Inc., and a figure certainly within the substantial margin of error inherent in any method of attributing income among the components of a unitary business.

463 U.S. at 183-84.

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[12] Container Corporation argued that application of the three-factor formula to its business was unconstitutional because its foreign subsidiaries were significantly more profitable than it was and the formula's reliance on indirect measures of income (payroll, property and sales) systematically distorted the true allocation of income between Container and its subsidiaries. 463 U.S. at 181.

Similarly, in *Moorman*, the Supreme Court concluded that Iowa's single-factor apportionment formula was constitutionally applied where the taxpayer showed a 48% difference between the amount assessed by the state under the single-factor method and the amount of tax that would have been due were taxpayer permitted to utilize the three-factor formula. The Court noted that the taxpayer failed to show that the single-factor method produced a grossly unfair result. 437 U.S. at 275. Thus, while not explicitly so stating, the Supreme Court has held that a 48% disparity is within the permissible margin of error.

Applying the principles of these cases, we conclude that Unisys has not demonstrated a due process violation. Unisys can claim only that were the total property, payroll and sales of the unitary business enterprise included in the fractions of the three-factor formula, its tax due would be approximately 44.5% less than the figure arrived at by the Board in its calculation under the three-factor formula set forth in the Tax Code. We do not believe that a 44.5% disparity between calculations lies outside of the constitutional margin of error delineated by the Supreme Court. A 44.5% disparity is not even remotely close to the 266% and 300% disparities cited by the Court as unconstitutional in *Norfolk & Western Railway* and *Hans Rees' Sons*, and is somewhat less than the variance upheld in *Moorman*.

Alternatively, Unisys argues that it is entitled to statutory equitable relief under the special apportionment provision set forth in Section 401(3)2.(a)(18) of the Tax Code, 72 P.S. § 7401(3)2.(a)(18) [Subsection (18)],[13] which provides:

> (18) If the allocation and apportionment provisions of this definition do not fairly represent the extent of the

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[13] Subsection (18) is made applicable to the franchise tax by 72 P.S. § 7602(b)(1).

taxpayer's business activity in this State, the taxpayer may petition the Secretary of Revenue or the Secretary may require, in respect to all or any part of the taxpayer's business activity:

(A) Separate accounting;

(B) The exclusion of any one or more of the factors;

(C) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(D) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income. In determining the fairness of any allocation or apportionment, the Secretary of Revenue may give consideration to the taxpayer's previous reporting and its consistency with the requested relief.

The Department claims that Subsection (18) is not applicable to Unisys' situation because it "is only to be used in quirky, nonrecurring situations, and to avoid constitutional infractions . . . ." (Brief at 23.) We disagree. First, we see nothing in the language of the statute to suggest that it is reserved for "quirky" situations. Moreover, it would make little sense for the legislature to allow correction of isolated inaccuracies, but prohibit administrative adjustment where, because of its structure, a company was overtaxed (or undertaxed) year after year. We will not assume that the legislature intended such an absurd result.

Next, while Subsection (18) certainly does provide a mechanism whereby the Department can obviate the need for court challenges in those situations rising to the level of due process violations, use of the language "do not *fairly represent* the extent of the taxpayer's business activity in the state" plainly implicates the power to address a broader range of error than merely that which may be characterized as "grossly

disproportionate." It gives the Department broad discretion to make appropriate adjustments where any substantial inaccuracy results from application of the allocation and apportionment provisions.

Having determined that Subsection (18) is applicable, we must next consider whether the Department has abused its discretion in refusing to make an adjustment in this case. In support of its claim that adjustment is inappropriate, the Department states that, "Presumably, taxpayer's intangible assets are . . . managed and controlled at its corporate headquarters [in Pennsylvania]. If taxpayer were to sell one of its subsidiaries and realize nonbusiness income for corporate net income tax purposes, the gain would be entirely allocable (and therefore totally taxable in) the Commonwealth." (Brief at 24.) The Department's point in this regard is somewhat obscure, to say the least. If it intends to say that the Commonwealth has a closer connection with Unisys' out of state subsidiaries than with those of a foreign corporation headquartered out of state, such an argument would appear more pertinent to Unisys' initial claim that it should *exclude* such holdings from the total capital stock value subject to tax than to the claim that it should *include* those subsidiaries' values in the apportionment formula. Moreover, this argument would seem inconsistent with the fundamental concepts underlying the unitary business enterprise theory.

Next, the Department argues that, "One has to wonder how unfair an apportionment provision can be to the taxpayer when over a 13 year period, the apportionment provisions average well under 10%." (Brief at 24.) This argument entirely misses the point. It matters not whether the formula allocates a large or a small share of the business to the Commonwealth, but how far that allocation varies from the actual share. For instance, in *Norfolk & Western Railway*, a due proc-

ess violation was found where the allocated and actual shares were 8% and 3% respectively. Here, although the allocated share may have averaged less than 10%, the discrepancy between the allocated and actual shares was nearly 45 %. Even giving due deference to the Department's interpretation of the statute, we simply cannot say that an allocation so far at variance "fairly represents the extent of [Unisys'] business activity in this State." Accordingly, we hold that the Department abused its discretion in refusing to adjust Unisys' allocation share under Subsection (18). We emphasize that we do not hold, as the Department argues, that Subsection (18) relief is required "in all franchise tax cases in which the taxpayer owns subsidiaries." (Brief at 23.) Each case must be decided on its own merits, subject to the Department's sound discretion. We simply hold that a variance of this magnitude, although not of constitutional proportions, requires statutory relief.

Nor do we hold that the particular remedy sought by Unisys—inclusion of the subsidiaries' data in the three factor formula—is mandated, although that would appear to be a sensible approach, and one that would serve the interests of accuracy promoted by Subsection (18). The statute gives broad discretion to the Department to use any method which will produce a fair and equitable result, and we will not here limit the method the Department must use. We hold only that some form of Subsection (18) relief must be accorded.

We reverse the orders of the Board, and remand for further proceedings consistent with this opinion.

BONNIE BRIGANCE LEADBETTER, Judge

Judge Doyle dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 151 F.R. 1991

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

No. 201 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

No. 202 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

ORDER

AND NOW, this 8th day of March, 1999, the orders of the Board of Finance and Revenue in the above captioned matters are hereby reversed. The Chief Clerk is directed to remand this case to the Department of Revenue for further proceedings consistent with this opinion unless exceptions are filed within 30 days in conformity with Pa. R.A.P. 1571(i).

BONNIE BRIGANCE LEADBETTER, Judge

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 151 F.R. 1991

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

NO. 201 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

NO. 202 F.R. 1993

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

ARGUED: May 6, 1998

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: March 8, 1999

While I agree with that portion of the majority's decision concluding that the apportionment formula used by the Department of Finance and Revenue (Department) to calculate Unisys Corporations' (Unisys) franchise taxes complied with due process, I dissent from that portion of the majority's opinion that the disparity between the calculations of Unisys' al-

located and actual shares was sufficient reason to require the Department to afford Unisys equitable relief under Section 401(3)2.(a)(18) of the Tax Reform Code of 1971[14] (referred to herein as Subsection 18). I disagree because I believe that Subsection 18 only requires equitable relief where the disparity is unconstitutional, not where the disparity is something less than unconstitutional, i.e., unfair. To hold otherwise would place us at variance with other states that have adopted an identical provision. Also, no court has found that a 45 % disparity is anywhere near the range of disparity previously held to require equitable relief.

This case involves the Pennsylvania franchise tax that is imposed on the capital stock value of every out-of-state corporation doing business in Pennsylvania. In order to come up with the appropriate tax for that portion of a corporation's business activity conducted only in Pennsylvania, there are two methods that may be used to apportion the value of its capital stock—the single-factor method and the three-factor method.[15] Because the choice of method is left up to the taxpayer, Unisys utilized the three-factor apportionment formula (averaging fractions of property, payroll and sales) to determine the taxable portion of its foreign corporations' corporate stock value for the tax years 1984-1994. In doing so, it did not include in its calculations the property, payroll and sales figures from its subsidiaries but only those figures from its parent corporation.

In settling Unisys' franchise tax for the years in question, the Department increased the amount reported by Unisys by including the property, payroll and sales figures of

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[14] Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7401(3)2.(a)(18).

[15] *See* majority opinion at page 3, note 4 and page 4 for the formulas used in each of those methods.

its subsidiaries which resulted in a higher franchise tax to be paid by Unisys in Pennsylvania.[16] Unisys appealed the Department's settlements, which were denied and this appeal followed. On appeal, the majority disagrees with Unisys' contention that the Department's exclusion of its subsidiaries' property, payroll and sales figures in calculating the franchise tax violated the commerce clause and due process clause of the United States Constitution. The majority states that if the method used to apportion the total income between taxable in-state and non-taxable out-of-state components is fair, due process will be met. Further, because the purpose of the formula is to apportion the value of the entire business enterprise among different jurisdictions, the majority concludes, "it can hardly be subject to dispute that an apportionment formula which includes data from the entire enterprise will yield a more accurate result than a formula based solely upon the parent corporation's operations." (Majority opinion at p. 8.) The majority then continues to explain that an apportionment formula complies with due process when, on its face, it is reasonably calculated to reach only the profits earned within the state and is not inherently arbitrary, and the income attributed to the State is not out of all appropriate proportions to the business transacted, i.e., not grossly distorted.

However, the majority goes on to determine that Subsection 18 applies even if the disparity is constitutional, and that Unisys is entitled to equitable relief from the Depart-

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[16] Pursuant to Subsection 18, the Department has the authority to adjust the taxpayer's accounting when it does not fairly represent the extent of the taxpayer's business in Pennsylvania. Additionally, we note that pursuant to Sections 401(3)2.(a)(10), (13), and (15) of the Tax Code, 72 P.S. §§7401(3)2.(a)(10), (13), and (15), when calculating the denominator of the property, payroll and sales factors, the taxpayer must include the property, payroll and sales of the taxpayer *everywhere* during the tax period.

ment because of the magnitude of the 45 % disparity.[17] I disagree with the majority that a 45% variance is of such a magnitude that it requires equitable relief from the Department because that same figure cannot be found to be within the range of constitutionality and, therefore, a fair determination of the taxes owed and, at the same time, be "unfair" and of such a magnitude of disparity that it also requires equitable relief.

The plain language of Subsection 18 shows that it was meant to provide equitable relief only when the disparity was palpably so great that it would violate due process. Subsection 18 provides:

> (18) *If the allocation and apportionment provisions of this definition do not fairly represent the extent of the taxpayer's business activity in this State,* the taxpayer may petition the Secretary of Revenue or the Secretary of Revenue may require, in respect to all or any part of the taxpayer's business activity:
> (A) Separate accounting;
> (B) The exclusion of one or more of the factors;
> (C) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or
> (D) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

72 P.S. §7401(3)2.(a)(18) (Emphasis added.)

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[17] The majority apparently agrees with Unisys' statement: "If the distortion is not cured by constitutional relief, it should be cured by statute." (Unisys' brief at p. 24.)

"Fairness" is a constitutional term.[18] It means that either a taxpayer did not receive proper procedural protection or the statute did not treat it similarly to other taxpayers. *Commonwealth v. Mercadante*, 676 A.2d 1309 (Pa. Cmwlth. 1996); *Triumph Hosiery Mills, Inc. v. Commonwealth*, 343 A.2d 710 (Pa. Cmwlth. 1975), *aff'd*, 469 Pa. 92, 364 A.2d 919 (1976), *appeal dismissed*, 429 U.S. 1083 (1977). Subsection 18 addresses the situation where the tax, *as applied*, leads to an unconstitutional result but that litigation can be avoided by allowing administrative officials to modify the tax as applied to bring it within constitutional norms. It does not mean that a taxpayer can claim administrative relief for unfairness that does not rise to the level of unconstitutionality; otherwise, such a claim becomes similar to the plea that all parents hear from their children when they have to do something they do not want to do and they complain, "it's not fair."

The language in Subsection 18 was adopted from and is identical to Section 18 of The Uniform Division of Income for State Tax Purposes Act that was approved in 1957 by the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association. That Act deals with the allocation and apportionment of income of business in multiple jurisdictions and is designed for those states that have taxes measured by net income. Those states that have also adopted Section 18 and have provisions identical to Subsection 18 do not interpret "unfairness" to be anything less than unfair constitutionally. *See, e.g., Mobile Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425

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[18] I do not see how we can apply anything other than the constitutional standard because otherwise Subsection 18 would be void for vagueness. No one would dispute that a statue that provides "a fair tax will be imposed" would be struck down as unconstitutional. Similarly, if the majority view prevails, Subsection 18 should be struck down because what "fairly represents" is similarly vague and standardless.

(1980); *Capitol Industries-EMI, Inc. v. Bennett*, 682 F.2d 1107 (9th Cir. 1982); *Atlantic Richfield Co. v. State*, 705 P.2d 418 (Alaska 1985); *Colgate-Palmolive Co. v. Franchise Tax Bd.*, 10 Cal. App. 4th 1768 (Cal. Ct. App. 1992); *Miami Corporation v. The Department of Revenue*, 571 N.E. 2d 800 (Ill. App. Ct. 1991); *Liquid Transporters, Inc. v. Revenue Cabinet, Commonwealth of Kentucky*, 721 S.W.2d 722 (Ky. Ct. App. 1986); *E.I. Du Pont De Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (Me. 1996); *Lee v. Department of Revenue*, ___ Or. Tax. ___ (Or. T.C. 1998). While many taxpayers believe that the taxes they pay are "unfair," as long as they are constitutional and calculated in accordance with a statute, they must be paid. To allow a generalized claim of unfairness would lead to a standardless system where tax relief could be granted for nonsalutorious reasons.

Not only do I disagree with the majority that Unisys' increased franchise tax is unfair, I do not believe that the 45% disparity is "unfair" under any definition of that term. Unisys created the disparity in this case by choosing to use the three-factor method instead of the single-factor method. Under the single-factor method, all of the property owned by Unisys, both tangible and intangible, would have been valued and used in place of the property, payroll and sales fractions in the three-factor method to calculate its taxes. Taxpayers that own the majority of the voting stock of another corporation, e.g., a subsidiary, are entitled to exclude or exempt the value of that corporation from the numerator of the single-factor fraction. *See* Act of April 20, 1927, P.L. 311, *as amended*, by the Act of June 22, 1931, P.L. 687, 72 P.S. § 1894. If Unisys had elected to use the single-factor method of apportionment, most of its subsidiaries would have been excluded from the calculation of the franchise tax and its tax would have been considerably lower. However, it chose not

to use that method and cannot now complain that the higher tax based on the three-factor formula entitles it to equitable relief.

Finally, ignoring that Unisys chose its method of calculation, it has offered no reason as to how the tax, as applied to it, is "unfair" other than saying if the tax was calculated its way, it would be less and as a result, the tax as imposed is unfair. Unisys must provide something more than that to establish "unfairness" other than saying it is no matter what the standard is that someone comes up with to interpret Subsection 18. Moreover, the only time a court has found that a disparity required equitable relief was where the number was so egregious. *See e.g., Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* 283 U.S. 123 (1931) (court held there was a violation of due process where foreign corporation was assessed 80% of its income while less than 22% of its income was actually related to its operations in that state, resulting in a disparity of 250% in the amount of taxes assessed and the amount due). *See also Norfolk & Western Railway v. Missouri State Tax Commission,* 390 U.S. 317 (1968) (court held that gross disparity exceeded constitutional limits where foreign corporation was found to have 8% of its rolling stock located in Missouri, while in actuality there was only 3% located there, resulting in an approximate 166% disparity).[19]

In order for Subsection 18 to apply, there must be an unfair and unconstitutional allocation and apportionment of

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[19] We note that the majority relies on *Norfolk & Western Railway* to show that a constitutional violation was found where the allocated and actual shares were 8% and 3% respectively, and because the discrepancy between the allocated and actual shares in this case of 45% was much greater, Unisys requires relief. However, the majority misapplies the calculations from *Norfolk & Western Railway* because the actual disparity in that case was approximately 166%. Compared to the 166% disparity in *Norfolk & Western Railway*, the 45% disparity in this case is almost *de minimis*.

the foreign corporation's income that does not fairly represent its actual business activity in the State. No case has held that anywhere near a 45% disparity warrants equitable relief because the disparity is far less than in any case where equitable relief was granted. Accordingly, I would hold that Unisys' 45% disparity was not unfair because it fairly represents its business activity in this State and affirm the Department's decision.

DAN PELLEGRINI, JUDGE

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
NO. 151 F.R. 1991
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
NO. 201 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
NO. 202 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent

ORDER

AND NOW, this 12th day of March, 1999, Dissenting Opinion filed in the above-captioned matter on March 8, 1999 is amended to read as follows:

1. The first full sentence on page 2 is amended to read as follows:

> In doing so, it *included* in its calculations the property, payroll and sales figures from its subsidiaries but only those figures from its parent corporation.

2. The first sentence of the first full paragraph on page 2 is amended to read as follows:

> In settling Unisys' franchise tax for the years in question, the Department increased the *net worth and average net income* reported by Unisys by including the *net worth* of its subsidiaries and *adding the dividends of its subsidiaries* which resulted in a higher franchise tax. [Footnote omitted.]

3. The third sentence of the first full paragraph on page 2 is amended to read as follows:

> On appeal, the majority disagrees with Unisys' contention that the Department's *exclusion* of its subsidiaries' property, payroll and sales figures in calculating the franchise tax violated the commerce clause and due process clause of the United States Constitution.

DAN PELLEGRINI, JUDGE

CERTIFIED FROM THE
RECORD
AND ORDER EXIT
MAR 15 1999
/s/C.R. Hostutler
Deputy Prothonotary—Chief Clerk

Appendix C

[J-172-2002]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 73 MAP 1999
UNISYS CORPORATION, Appellee
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP.
AT NO. 76 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 151 F.R. 1991 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 74 MAP 1999
UNISYS CORPORATION, Appellee
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP.
AT NO. 77 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

Appendix C

No. 75 MAP 1999
UNISYS CORPORATION, Appellee
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellant
CROSS APPEAL OF UNISYS CORP. AT NO. 78 MAP 1999
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 76 MAP 1999
UNISYS CORPORATION, Appellant
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 151 F.R. 1991 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

No. 77 MAP 1999
UNISYS CORPORATION, Appellant
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 201 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

Appendix C

No. 78 MAP 1999
UNISYS CORPORATION, Appellant
v.
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE & REVENUE, Appellee
Appeal from the Order of the Commonwealth Court entered on 3/8/99 at 202 F.R. 1993 reversing the Order dated 3/29/91 and remanding to the Department of Finance and Revenue

Re-submitted: August 22, 2002

ORDER

PER CURIAM:

AND NOW, this 31st of December, 2002, Appellee's application for reargument is DENIED.

TRUE & CORRECT COPY
ATTEST: DEC 31 2002
/s/Shirley J. Phipps
APPELLATE CLERK

Pennsylvania Statutes

72 P.S. § 7401. Definitions

The following words, terms, and phrases, when used in this article, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

. . . .

(3) "Taxable income."

. . . .

2. In case the entire business of any corporation, other than a corporation engaged in doing business as a regulated investment company as defined by the Internal Revenue Code of 1954, as amended, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, as defined in subclause 1 hereof, and may be determined as follows:

(a) Division of income.

. . . .

(9) . . . (B) For purposes of apportionment of the capital stock-franchise tax as provided in section 602 of Article VI of this act, the apportionment fraction shall be the property factor plus the payroll factor plus the sales factor as the numerator, and the denominator shall be three.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period but shall not include the security

interest of any corporation as seller or lessor in personal property sold or leased under a conditional sale, bailment lease, chattel mortgage or other contract providing for the retention of a lien or title as security for the sales price of the property.

. . . .

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

. . . .

72 P.S. § 7601. Definitions and reports

(a) The following words, terms and phrases when used in this Article VI shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

"Average net income." The sum of the net income or loss for each of the current and immediately preceding four years, divided by five. If the entity has not been in existence for a period of five years, the average net income shall be the average net income for the number of years that the entity has actually been in existence. In computing average net income, losses shall be entered as computed, but in no case shall average net income be less than zero. The net income or loss of the entity for any taxable year shall be the amount set forth as income per books on the income tax return filed by the entity with the Federal government for such taxable year, or if no such return is made, as would have been set forth had such a return been made, subject, however, in either case to any correction thereof, for fraud, evasion or error. In the case of any entity which has an investment in another corporation, the net income or loss shall be computed on an unconsolidated basis exclusive of the net income or loss of such other corporation.

. . . .

"Capital stock value." The amount computed pursuant to the following formula: the product of one-half times the sum of the average net income capitalized at the rate of nine and one-half per cent plus seventy-five per cent of net worth, from which product shall be subtracted one hundred thousand dollars ($100,000), the algebraic equivalent of which is

.5 x (average net income/.095 + (.75)
(net worth))

. . . .

"Foreign Entity." Every corporation, joint-stock association, limited partnership and company whatsoever, now or hereafter incorporated or organized by or under the law of any other state or territory of the United States, or by the United States, or by or under the law of any foreign government, and doing business in and liable to taxation within the Commonwealth or having capital or property employed or used in the Commonwealth by or in the name of any limited partnership or joint-stock association, copartnership or copartnerships, person or persons, or in any other manner doing business within and liable to taxation within the Commonwealth other than nonprofit corporations, banks, savings institutions, title insurance or trust companies, building and loan associations and insurance companies is a foreign entity.

"Net worth."

(1) Net worth shall be the sum of the entity's issued and outstanding capital stock, surplus and undivided profits as per books set forth for the close of such tax year on the income tax return filed by the entity with the Federal Government, or if no such return is made, as would have been set forth had such return been made, subject, however, in either case to any correction thereof for fraud, evasion or error. In the case of any entity which has investments in the common stock of other corporations, the net worth shall be the consolidated net worth of such entity computed in accordance with generally accepted accounting principles. Net worth shall in no case be less than zero.

. . . .

"Subsidiary corporation." Any corporation, a majority of the total issued and outstanding shares of voting stock of which are owned by the taxpayer corporation directly or through one or more intervening subsidiary corporations.

. . . .

72 P.S. § 7602

. . . .

(b)(1) Every foreign entity from which a report is required under section 601 hereof, shall be subject to and pay to the department annually, a franchise tax which is the greater of (i) seventy-five dollars ($75) or (ii) the amount computed at the rate of ten mills for the calendar year 1971 and the fiscal years beginning in 1971 through calendar year 1986 and fiscal years beginning in 1986, at the rate of nine mills for the calendar year 1987 and for fiscal years beginning in 1987 and at the rate of nine and one-half mills for calendar year 1988 and fiscal years beginning in 1988 and each year thereafter, upon a taxable value to be determined in the following manner. The capital stock value shall be ascertained in the manner prescribed in section 601(a) of this article. The taxable value shall then be determined by employing the relevant apportionment factors set forth in Article IV: Provided, That the manufacturing, processing, research and development exemptions contained under section 602(a) shall also apply to foreign corporations and in determining the relevant apportionment factors the numerator of the property, payroll, or sales factors shall not include any property, payroll or sales attributable to manufacturing, processing, research or development activities in the Commonwealth. Any foreign corporation, joint-stock association, limited partnership or company subject to the tax prescribed herein may elect to compute and pay its tax under section 602(a): Provided, That any foreign corporation, joint-stock association, limited partnership or company electing to compute and pay its tax under section 602(a) shall be treated as if it were a domestic corporation for the purpose of determining which of its assets are exempt from taxation and for the purpose of determining the proportion of the value of its capital stock which is subject to taxation.

. . . .

72 P.S. § 7603. Procedure; enforcement; penalties

Parts III, IV, V, VI, and VII of Article IV are incorporated by reference into this article in so far as they are applicable to the tax imposed hereunder.

Pennsylvania Regulations

61 Pa. Code

§155.26. Average net income—fixed formula.

(a) Average net income is the sum of the taxpayer's net income or loss for each of the current and immediately preceding 4 years, divided by five.

(b) Net income or loss is the amount set forth as income per books on the income tax return filed by the taxpayer with the Federal government, or if no return is made, as would have been set forth had the return been made. The net income or loss shall be computed on an unconsolidated basis exclusive of the net income or loss of an investee corporation and exclusive of the net income or loss of an investee corporation accounted for under the equity method of accounting. The amount set forth as income per books on the income tax return filed with the Federal government or as would have been set forth had the return been made, shall be adjusted to include dividends received from investee corporations, including dividends from investments accounted for under the consolidated or equity methods of accounting.

(c) In computing average net income, losses shall be entered as computed, but the average net income may not be less than zero.

. . . .

§155.27. Net worth—fixed formula.

(a) Net worth is the sum of the taxpayer's issued and outstanding capital stock, surplus and undivided profits as per books set forth on the income tax return filed by the taxpayer with the Federal government, or if no return is made, as would have been set forth had a return been made.

(b) In the case of a taxpayer which has investments in the common stock of another corporation, net worth is the consolidated net worth of the taxpayer computed in accordance with generally accepted accounting principles. Book value for investments of stock of other corporations includes original cost plus the investor's share of the investee's earnings or losses. For the purpose of this subsection, investments in the common stock of another corporation means investments which shall be accounted for using the equity method of accounting or which shall be consolidated under generally accepted accounting principles.

(c) Net worth may not be less than zero.

(d) Net worth does not include the cost of treasury stock.

. . . .

Appendix E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 151 1991

UNISYS CORPORATION, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

PETITION FOR REVIEW

1986 FRANCHISE TAX

TO THE HONORABLE, THE JUDGES OF THE COMMONWEALTH COURT:

1. This court has jurisdiction over this matter by reason of sections 407(c) and 603 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7407(c) and 7603, and sections 763 and 5105 of the Judicial Code, 42 Pa. C.S.A. §§763 and 5105.

2. Petitioner is a corporation organized under the laws of the State of Delaware. The corporate headquarters during 1986 was in Detroit, Michigan. The corporate headquarters was transferred to Blue Bell, Pennsylvania in 1988.

3. Petitioner seeks review of an Order of the Board of Finance and Revenue (the "Board") with respect to the Franchise Tax for the year ended December 31, 1986.

4. The Order of the Board sought to be reviewed was mailed to Petitioner's representative on March 29, 1991, bearing Docket No. R-13,575.

5. The Board erred by refusing to resettle an erroneous settlement by the Department.

6. In its settlement, the Department of Revenue (the "Department") included in book net income dividends from foreign subsidiaries, and included in net worth the net worth of foreign subsidiaries whose operations are unrelated to Pennsylvania. Each of these errors has the effect of imposing unconstitutional extra-territorial taxation.

7. The Department calculated average book income on a separate company basis, but included dividends from foreign subsidiaries. There is no statutory support for including such dividends. Section 601(a) of the Tax Reform Code requires that Average net income "be calculated exclusive of the net income or loss of an investee corporation".

8. The inclusion of such dividends in net income builds into the Pennsylvania tax base the earnings of foreign subsidiaries. However, the Department constructed the three apportionment factors exclusive of the activities of the foreign subsidiaries. In short, the Department determined capitalized net earnings an a unitary basis, but apportioned on a separate company basis.

9. The inclusion of dividends from foreign subsidiaries in capitalized net earnings imposes tax beyond the "water's edge" of the United States, in contravention of United States foreign policy, and in violation of the Supremacy Clause of the United States Constitution.

10. The Commonwealth has the authority under Section 401(3)2.(a)(18) of the Tax Reform Code to correct inequities in the statutory apportionment formula. If foreign dividends are not excluded from the net income component, the Commonwealth should include in the apportionment factors the income-producing activities of the overseas subsidiaries.

11. In calculating capital stock value, the Commonwealth improperly used the taxpayer's consolidated net worth reported in *Moody's*. The Department should have used separate company net worth as reported to the federal government, or alternatively consolidated net worth so reported.

12. Consolidated net worth includes the net worth of foreign subsidiaries having no connection with Pennsylvania. Therefore, again, the settlement imposes tax beyond the "water's edge" of the United States, in contravention of United

States foreign policy and in violation of the Supremacy Clause of the United States Constitution, and in violation of other constitutional provisions.

13. Net worth also includes the value of subsidiaries already subject to Pennsylvania's Franchise Tax, thereby imposing unconstitutional double taxation.

14. In the settlement, the Department included the net worth of foreign subsidiaries in the tax base. However, the Commonwealth apportioned the base to Pennsylvania by looking to only half of the business activities of the corporation, ignoring the fact that roughly half of the corporation does business overseas.

15. In any event, the Department erred in its settlement of the apportionment factors, which should have been calculated as presented to the Board below.

16. The petitions and other items submitted to the Department and the administrative boards below are incorporated herein by reference.

17. The action of the Board of Finance and Revenue is contrary to the Tax Reform code of Pennsylvania and the practice and policy of the Department of Revenue and is in violation of the due process and uniformity clauses of the Constitution of the Commonwealth of Pennsylvania and the due process, equal protection, commerce, and foreign commerce clauses of the Constitution of the United States.

18. Petitioner requests attorney's fees and costs, and declaratory and injunctive relief pursuant to 42 U.S.C. §1983.

WHEREFORE, Petitioner prays this Honorable Court, after hearing, to grant a resettlement and refund of Franchise Tax for the year ended December 31, 1986 in accordance with the foregoing.

Respectfully submitted,
/s/Joseph C. Bright

Appendix E

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Appendix E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 201 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
Petition For Review
(3/86 Franchise Tax)

TO THE HONORABLE, THE JUDGES OF THE COMMONWEALTH COURT:

1. This court has jurisdiction over this matter by reason of sections 407(c) and 603 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7407 (c) and 7603, and sections 763 and 5105 of the Judicial Code, 42 Pa. C.S.A. §§763 and 5105.

2. Petitioner is the successor by merger to Sperry Corporation, which was a corporation organized under the laws of the State of Delaware with its principal offices located in New York, New York.

3. Petitioner seeks review of an Order of the Board of Finance and Revenue with respect to the Franchise Tax for the year ended March 31, 1986.

4. The Order of the Board of Finance and Revenue sought to be reviewed was mailed to Petitioner's representative on April 16, 1993, bearing Docket No. C-17,792.

5. The Board erred by refusing to resettle an erroneous settlement by the Department of Revenue.

6. The Department of Revenue improperly added certain dividends to average net income for purposes of the fixed formula for determining Capital Stock Value. The dividends should not have been added back because they were not a part of book net income as reflected on the taxpayer's federal income tax return.

7. The taxpayer's book net worth for fixed formula purposes was improperly overstated by using consolidated book net worth. The result is a mismatch between the calculation of the base for taxation and the calculation of the apportionment factor. Either separate company book net worth should have been used or the factors should have included the items and activities of subsidiaries. The Board improperly failed to grant the taxpayer multiform, unrelated asset, or equitable apportionment treatment with respect to that part of its capital stock value that is unrelated to the exercise of its franchise in Pennsylvania.

8. The petitions and other items submitted to the Department and the administrative boards below are incorporated herein by reference.

9. The action of the Board of Finance and Revenue is contrary to the Tax Reform Code of Pennsylvania and the practice and policy of the Department of Revenue and is in violation of the due process and uniformity clauses of the Constitution of the Commonwealth of Pennsylvania and the due process, equal protection, and commerce clauses of the Constitution of the United States.

10. Petitioner requests attorney's fees and costs and declaratory and injunctive relief pursuant to 42 U.S.C. §1983.

WHEREFORE, petitioner prays this Honorable Court, after hearing, to grant a resettlement of Franchise Income Tax for the year ended March 31, 1986 in accordance with the foregoing.

/s/Joseph C. Bright
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Attorney for Petitioner

Appendix E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 202 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
Petition For Review
(3/85 Franchise Tax)

TO THE HONORABLE, THE JUDGES OF THE COMMONWEALTH COURT:

1. This court has jurisdiction over this matter by reason of sections 407(c) and 603 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7407 (c) and 7603, and sections 763 and 5105 of the Judicial Code, 42 Pa. C.S.A. §§763 and 5105.

2. Petitioner is the successor by merger to Sperry Corporation, which was a corporation organized under the laws of the State of Delaware with its principal offices located in New York, New York.

3. Petitioner seeks review of an Order of the Board of Finance and Revenue with respect to the Franchise Tax for the year ended March 31, 1985.

4. The Order of the Board of Finance and Revenue sought to be reviewed was mailed to Petitioner's representative on March 26, 1993, bearing Docket No. C-18,153.

5. The Board erred by refusing to resettle an erroneous settlement by the Department of Revenue.

6. The Department of Revenue improperly added certain dividends to average net income for purposes of the fixed formula for determining Capital Stock Value. The dividends should not have been added back because they were not a part of book net income as reflected on the taxpayer's federal income tax return.

7. The taxpayer's book net worth for fixed formula purposes was improperly overstated by using consolidated book net worth. The result is a mismatch between the calculation of the base for taxation and the calculation of the apportionment factor. Either separate company book net worth should have been used or the factors should have included the items and activities of subsidiaries. The Board improperly failed to grant the taxpayer multiform, unrelated asset, or equitable apportionment treatment with respect to that part of its capital stock value that is unrelated to the exercise of its franchise in Pennsylvania.

8. The Board improperly denied a portion of the taxpayer's claim for refund on the grounds that it was beyond the limitation period of Fiscal Code §503.

9. The petitions and other items submitted to the Department and the administrative boards below are incorporated herein by reference.

10. The action of the Board of Finance and Revenue is contrary to the Tax Reform Code of Pennsylvania and the practice and policy of the Department of Revenue and is in violation of the due process and uniformity clauses of the Constitution of the Commonwealth of Pennsylvania and the due process, equal protection, and commerce clauses of the Constitution of the United States.

11. Petitioner requests attorney's fees and costs and declaratory and injunctive relief pursuant to 42 U.S.C. §1983.

WHEREFORE, petitioner prays this Honorable Court, after hearing, to grant a resettlement of Franchise Tax for the year ended March 31, 1985 in accordance with the foregoing.

/s/Joseph C. Bright
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(215) 977-2000
Attorney for Petitioner

Appendix E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 151 F.R. 1991
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
No. 201 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent
No. 202 F.R. 1993
UNISYS CORPORATION, Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA, Respondent

NOTICE OF CROSS-APPEAL

Notice is hereby given that Unisys Corporation, Petitioner above named, hereby cross-appeals to the Supreme Court of Pennsylvania from the order entered in these appeals on the 14th day of April, 1999. This order has been entered in the docket as evidenced by the attached copies of the docket entries. The Commonwealth of Pennsylvania, Respondent above named, filed a notice of appeal on May 12, 1999.

Respectfully submitted,
/s/Kevin J. Moody
Joseph C. Bright, Esq., Attorney ID No. 03786
Kevin J. Moody, Esq., Attorney ID No. 34367
Wolf, Block, Schorr and Solis-Cohen LLP
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111 S. 15th Street
Philadelphia, PA 19102-2678
Attorneys for Petitioner
Unisys Corporation

Dated: May 13, 1999

Appendix E

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. ___ M.D. Appeal Docket 1999
UNISYS CORPORATION, Cross-Appellant-Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Cross-Appellee-Respondent
No. ___ M.D. Appeal Docket 1999
UNISYS CORPORATION, Cross-Appellant-Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Cross-Appellee-Respondent
No. ___ M.D. Appeal Docket 1999
UNISYS CORPORATION, Cross-Appellant-Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Cross-Appellee-Respondent

JURISDICTIONAL STATEMENT

Joseph C. Bright, counsel for cross-appellant-petitioner, files this jurisdictional statement pursuant to Pa. R.A.P. 909 and 910 in support of the notice of cross-appeal filed this date and sets forth the following:

1. This is an appeal from the order of the Commonwealth Court entered April 14, 1999. The as yet unreported opinion and order of the Commonwealth Court *en banc* per Judge Leadbetter filed March 8, 1999 (Judge Pellegrini dissenting with opinion; Judge Doyle dissenting without opinion), the March 12, 1999 order amending Judge Pellegrini's Dissenting Opinion, and the *per curiam* order entered April 14, 1999 are appended to this jurisdictional statement as APPENDIX A.

2. The Commonwealth of Pennsylvania, Respondent below, filed a notice of appeal with the Commonwealth Court on May 12, 1999.

3. The jurisdiction of the Supreme Court is based upon the following factors:

(a) Section 9 of the Article V of the Pennsylvania Constitution which provides in pertinent part: "[T]here shall also be a right of appeal from a court of record . . . to an appellate court, the selection of such court to be as provided by law . . . ."

(b) Section 723 of the Judicial Code, 42 Pa.C.S. § 723 which provides in pertinent part: "Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section."

(c) Rule 1101 of the Pennsylvania Rules of Appellate Procedure which provides in pertinent part: "This Rule applies to any appeal to the Supreme Court from an order of the Commonwealth Court entered in: . . . (2) Any appeal from a decision of the Board of Finance and Revenue."

(d) The following cases establish this Court's jurisdiction and the right to appeal the Commonwealth Court's order directly to this Court by notice of appeal pursuant to Pa. R.A.P. 904, 909, 910: *Ross-Araco Corp v. Com., Bd. of Finance and Revenue,* 544 Pa. 74, 674 A.2d 691 (1996) and *Laurel Pipe Line Co. v. Com., Bd. of Finance and Revenue,* 537 Pa. 205, 642 A.2d 472 (1994).

4. The procedural history of this case is as follows: Petitioner is Unisys Corporation, formerly named Burroughs Corporation, and the successor by merger to Sperry Corporation. Sperry and Unisys timely filed Pennsylvania Franchise Tax returns for the tax years ending March 31, 1985 and March 31, 1986 (Sperry) and December 31, 1986 (Unisys). The Penn-

sylvania Department of Revenue (Department) settled the Franchise Tax by increasing the tax reported.

Petitioner's appeals of the settlements to the Department were denied, and Petitioner thereafter timely filed appeals with the Board of Finance and Revenue (Board). The Board denied Petitioner's appeals, and Petitioner thereafter timely appealed the Board's decisions to the Commonwealth Court.

The parties filed a comprehensive stipulation of facts, and the Commonwealth Court consolidated the appeals for briefing and argument. By opinion and order filed March 8, 1999, the Commonwealth Court *en banc* reversed the Board's orders and remanded the case to the Department for proceedings consistent with the opinion, subject to the filing of exceptions pursuant to Pa. R.A.P. 1571(i). Judge Pellegrini dissented with opinion, and Judge Doyle dissented without opinion.

Petitioner and the Commonwealth timely filed exceptions and a stipulation consenting to the entry of final judgment without further proceedings on the exceptions. By order entered April 14, 1999, the Commonwealth Court *per curiam* overruled the parties' exceptions and entered its prior order of March 8, 1999 as the final order in this case.

5. The precise questions presented for review are as follows:

> (a) Is the inherent distortion of tax liability produced by the mismatch between a consolidated tax base and separate company apportionment fractions a violation of the Due Process and Commerce Clauses of the Federal Constitution, regardless of the degree of numerical disparity?
>
> (b) Did the Commonwealth Court commit legal error by relying upon *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931) and its progeny as the basis for concluding that the 44.5% dis-

tortion of Unisys' tax liability fails to demonstrate a constitutional violation of the external consistency test of *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159 (1983)?

(c) Assuming the applicability of the *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* 283 U.S. 123 (1931), line of cases, did the Commonwealth Court commit legal error in concluding that the distortion of Petitioner's tax burden is not of a constitutional dimension?

(d) Did the Commonwealth Court commit legal error in concluding that Pennsylvania's Franchise Tax meets the internal consistency test of *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159 (1983)?

(e) If separate company fractions are used, must the Pennsylvania Franchise Tax base be constructed on a separate company basis to avoid impermissible double taxation?

(f) Did the Commonwealth Court commit legal error in refusing to determine and order a specific, appropriate form of relief based on the parties' stipulation?

Respectfully submitted,
/s/Kevin J. Moody
Joseph C. Bright, Esq.
Attorney ID No. 03786
Kevin J. Moody, Esq.
Attorney ID No. 34367
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Attorneys for Petitioner
Unisys Corporation

Dated: May 13, 1999

Supreme Court, U.S.
FILED
JUN 24 2003
OFFICE OF THE CLERK

No. 02-1543

In the Supreme Court of the United States

UNISYS CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
BOARD OF FINANCE AND REVENUE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner carried its burden of proving that the application of Pennsylvania's franchise tax led to a "grossly distorted result," "out of all appropriate proportion" to the business it transacted in Pennsylvania?

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STATEMENT OF THE CASE

Petitioner, Unisys Corporation, claimed in the state courts that Pennsylvania's scheme for taxation of foreign business franchises unconstitutionally subjected it to tax on income generated outside Pennsylvania. In its petition, Unisys asks the Court to review a decision of the Pennsylvania Supreme Court which held that Unisys failed to meet its "heavy burden" of proving that the state tax resulted in a violation of the Due Process or Commerce Clause.

1. The Pennsylvania Franchise Tax is imposed on the Capital Stock Value of Foreign Corporations doing business in Pennsylvania. The statute defines capital stock value as the average of 75% of net worth and capitalized average net income, subject to a fixed deduction. Pa. Stat. Ann., tit. 72 §7601(a) (Purdon 2003). The corporation's net worth includes net worth of subsidiaries, whether or not they do business in Pennsylvania, but net income is assessed on a separate company basis, and does not include income from subsidiaries, though it does include dividends from them.

Once capital stock value is calculated as the tax base, a statutory formula is applied to apportion the value attributable to business activities in Pennsylvania. The taxpayer may elect to use either a "single factor" or a "three factor" apportionment formula. Under the single factor method, the tax due is calculated by the following formula:

$$\frac{\text{Total assets minus exempt assets}}{\text{Total Assets}} \times (\text{Actual value}) \times (\text{tax rate}) = \text{Tax due}$$

Exempt assets include real and tangible personal property outside Pennsylvania. App. 137a, n.4. The "three factor" apportionment formula applicable to foreign corporations calculates the average of three fractions:

Property in PA	Payroll in PA	Sales in PA
Property Everywhere,	Payroll Everywhere,	Sales Everywhere

The property, payroll and sales figures used in the apportionment formula pertain only to the taxpayer corporation itself, and not to its subsidiaries. After the tax base is reduced by the apportionment factor, the tax is calculated by applying a millage rate to the taxable value.

The Pennsylvania Tax Code also includes a "safety valve" provision available to a taxpayer who demonstrates that the franchise tax is unfair in its application. Pa. Stat. Ann., tit. 72 §7401(3)2.(a)(18) (Purdon 2003). If the allocation and apportionment provisions "do not fairly represent the extent of the taxpayer's business activity in [the] State," the taxpayer may petition the Secretary of Revenue to use some other method of calculating its taxes "to effectuate an equitable allocation and apportionment of the taxpayer's income." *Id.*

2. Unisys elected to use the "three factor" formula and calculated its tax base without regard to value attributable to its subsidiaries. In settling Unisys' franchise tax, the Department of Revenue took into account value of investments in subsidiaries and dividends paid by them in establishing the tax base, but did not include the subsidiaries in applying the three factor apportionment formula, which pertained only to Unisys itself. Unisys claimed this had the effect of distorting its tax liability by increasing the taxable value by 44.5%, and it filed petitions in the Board of Finance and Revenue arguing that the tax violated the Commerce and Due Process Clauses of the United States Constitution as well as Pennsylvania statutory law. The Board denied the petitions, and Unisys appealed to Commonwealth Court.

Commonwealth Court held, in a 5-2 decision, that Unisys had not demonstrated that its rights under the Due Process or Commerce Clause were infringed, but that it nevertheless was entitled to adjustment of its tax pursuant to the "safety valve" provisions of the Tax Code. The Court analyzed the constitutional issues within the framework of *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983) and *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), and concluded that Unisys failed to meet its heavy burden of proving by "'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in the state" or has "led to a grossly distorted result.'" App. 142a.[1] Commonwealth Court concluded that the "distortion" Unisys claimed as a result of the statutory apportionment formula — 44.5% beyond what would be calculated by using actual value, was well within the limits allowed by this Court. Commonwealth Court noted that the Court had disapproved formulas resulting in distortions of more than 250% and 166% in *Hans Rees'* and *Norfolk and Western Railway*, respectively, but had implicitly approved, in *Moorman*, a variation of 48%. Commonwealth Court went on to conclude, however, that while any discrepancies wrought by the formula were not of constitutional proportions, they were still sufficient to require statutory relief.

The dissenting judge agreed that the franchise tax was constitutional as applied to Unisys, but disagreed

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[1]The Court quotes *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978), which in turn quoted *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931) and *Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n.*, 390 U.S. 317, 326 (1968).

that it was entitled to statutory relief.[2] He believed that Unisys should not be heard to complain about the three factor formula, since it had elected to use it instead of the single factor formula which he said would have resulted in a lower tax. App. 156a. He also believed that Unisys "has offered no reason as to how the tax, as applied to it, is 'unfair' other than saying if the tax was calculated its way, it would be less and, as a result, the tax as imposed is unfair." App. 157a.

The Pennsylvania Supreme Court reversed, in a 4-3 decision, agreeing that the tax imposed on Unisys was constitutional, but also concluding that it was not entitled to statutory relief. The state supreme court decided the case on what it viewed as Unisys' failure to meet its burden of demonstrating that the apportionment formula, applied to it, was inequitable, and of failing to provide the court with sufficient information to construct a "baseline" by which any claimed distortion could even be measured.

The state supreme court recognized that this Court has placed the burden of showing that a tax is unconstitutional on the taxpayer: "[T]he Court restricts the impact of theoretical attacks upon all but the most arbitrary of formulae by generally limiting the inquiry to the relatively minimal test of internal consistency, while preserving the opportunity for taxpayers to more meaningfully challenge apportionment applications by demonstrating a substantial disparity between the tax burden imposed upon them and some reasonable baseline measure." App. 23a. The court concluded that a taxpayer must "account for the methodology by which a tax base is calculated in establishing a baseline for

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[2]Judges Pellegrini and Doyle dissented, but only Judge Pellegrini wrote an opinion, in which Judge Doyle did not join.

purposes of external consistency assessment," App. 28a, and held that Unisys failed to meet its burden:

> In summary, Pennsylvania's scheme for taxation of foreign business franchises may be less than ideal and, absent statutory fairness adjustment, unconstitutional in some applications. Nevertheless, a taxpayer alleging Commerce and Due Process Clause violations bears a substantial burden to demonstrate by clear and cogent evidence that the state is taxing income earned outside its jurisdiction. *See Container Corp.*, 463 U.S. at 169-70, 103 S.Ct. at 2942-43. Here, Unisys has presented baseline figures predicated solely upon full factor representation of subsidiaries, while failing to establish an adequate correlation between the hybrid, adjusted tax base ascribed to it and factor representation on such terms. Pursuant to the standards crafted by the United States Supreme Court, we conclude, therefore, that Unisys has failed to carry its heavy burden. For much the same reasons, we reach the same result on consideration of the statutory fair apportionment provisions.

App. 29a-30a.

Justices Nigro and Newman each wrote dissenting opinions. Justice Nigro believed that the Pennsylvania scheme was inherently flawed, though he also observed that "While Pennsylvania's scheme will no doubt produce constitutional results in some instances, the practical effect of such a scheme on other occasions is the unconstitutional taxation of out-of-state value and impermissible double taxation." App. 41a. Justice Nigro

believed that the majority placed too heavy a burden on Unisys to demonstrate its claim that the tax was unfair as applied to it, and disagreed that Unisys used "unreasonable methods in calculating the tax base in comparison to the Department's methodology," believing that "the fact that Unisys calculated its franchise tax liability with full factor representation while failing to compensate for the 'hybrid' nature of the franchise tax base is not necessarily fatal to its entire claim." App. 43a-44a. He also believed that the majority erred in "giving substantial weight to Unisys's actual franchise tax liability in addressing its constitutional claim." App. 44a.

In her dissent, Justice Newman would have held that the taxing scheme was unconstitutional because "it has the potential to tax extra-territorial income." App. 54a.

REASONS FOR DENYING THE WRIT

The Court should decline to grant the writ because the Pennsylvania Supreme Court's decision is an unremarkable, straightforward, and fact-intensive, application of the Court's well established principles for analyzing Commerce Clause and Due Process Clause challenges to apportionment formulas. Other state courts do not seem to have difficulty in applying these principles, and there is no significant conflict among them.

1. Although petitioners insist that Pennsylvania's three factor apportionment formula is necessarily unconstitutional because it is "asymmetrical" — including value associated with subsidiaries in the calculation of the tax base but not the apportionment formula — the Pennsylvania Supreme Court rightly recognized that this Court has not entertained *theoretical*

challenges to taxing statutes. This Court has instead recognized that "the three factor formula is necessarily imperfect," *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 184 (1983), and has placed the burden squarely on the taxpayer of proving that the income apportioned to a state is "out of all appropriate proportion to the business transacted in that state." *Id.* at 181.

Petitioner's assertion that their burden of proof can be satisfied by merely pointing to the asymmetry of the taxing formula is not only at odds with the Court's decisions, it is simply incorrect. It is not true that Pennsylvania's three factor formula, considered in the context of the entire statutory scheme, *necessarily* results in an unconstitutional tax. First of all, petitioner elected to use this formula, rather than a single factor formula which, in the opinion of at least one judge, would have resulted in the exclusion of "most of its subsidiaries" from the tax base, and a tax that was "considerably lower." App. 156a. Secondly, although the tax base includes value of subsidiaries and the three factor apportionment formula does not, the Tax Code also provides for a flat reduction of 25% of the net value of a taxpayer who uses the formula. It is certainly possible that in some cases this reduction may more than offset the value associated with subsidiaries which is included in the tax base. Finally, there is a statutory "safety valve" by which a taxpayer can petition to have its tax reduced if the formula generates an unfair result. Thus, in order to determine whether petitioner had been unconstitutionally taxed, it *was* necessary to inquire into the facts specific to its case. This, and the Pennsylvania court's conclusion that the factual record was insufficiently developed, make this case a poor candidate for review by the Court.

The state supreme court concluded that the petitioner failed to provide sufficient evidence from which

the court could determine if Pennsylvania's formula caused a "distortion" resulting in an unfair tax. The court made no broad or sweeping conclusions regarding the taxing scheme, even conceding that it "may be less than ideal and, absent statutory fairness adjustment, unconstitutional in some applications." App. 29a. Its decision was very narrow, focusing on petitioner's failure of proof. The state supreme court concluded that it could not properly analyze petitioner's claim because petitioner failed to establish a proper baseline for measuring disproportionality. Specifically, the court found that petitioner had failed to take into account the statutory 25% reduction in net worth allowed unitary enterprises like Unisys, noting the undisputed "need for a taxpayer, addressing a tax base that incorporates unitary aspects but is substantially hybridized and adjusted, to account for the methodology by which the tax base is calculated in establishing a baseline for purposes of external consistency." App. 28a. This, the state supreme court concluded, Unisys failed to do, instead "present[ing] baseline figures predicated solely upon full factor representation of subsidiaries, while failing to establish an adequate correlation between the hybrid, adjusted tax base ascribed to it and factor representation on such terms." *Id.*

The case is therefore too fact intensive to present a clear constitutional question by which the Court could announce a principle of broad application. The precise holding of the Pennsylvania Supreme Court is that Unisys has failed to produce sufficient evidence to meet its burden of proof, which, correct or not, is a question of fact. Thus, resolution of this case is not likely to result in any rule of broad application.

2. Contrary to petitioner's suggestion, the state courts do not appear to be having difficulty following the Court's guidance regarding tax apportionment formulas.

Petitioners point to decisions of state courts in Maine and Wisconsin which, they say, present a conflict with the Pennsylvania decision which the Court should resolve. The conflict to which they point is overstated. The Wisconsin Court in *American Telephone and Telegraph Co. v. Wisconsin Dept. of Revenue*, 143 Wis.2d 533, 422 NW.2d 629 (1988) did indeed hold that that state's apportionment formula violated the Due Process and Commerce Clauses, but, like the Pennsylvania court, it recognized that this Court imposed no bright-line rule as to what a constitutional apportionment formula must contain and rejected AT&T's claim "that a fair apportionment formula must include in the property factor the value of its investments in its subsidiaries." *Id.* at 551-52, 422 NW.2d at 636-37. The court invalidated the Wisconsin formula because it found that "far too much income" was apportioned to Wisconsin, and that the state taxes imposed on AT&T were "grossly disproportionate to the benefits conferred." *Id.* at 551, 422 NW.2d at 636. The Pennsylvania court used the same approach, and presumably would have reached the same result had the record supported it, saying only that it could draw no proper conclusions based on the record, and therefore deciding that the taxpayer failed to meet its burden of proof. This is certainly not a direct conflict.

Similarly, the Maine Court in *E.I. DuPont De Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (Me. 1996), held that the statutory formula in that case did not violate the Commerce and Due Process Clauses, but again the Court cited *Container Corp.* and *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298 (1994) in recognition of the difficulty facing the states in devising apportionment formulas, and the consequent rule that "rough approximation" and "some degree of arbitrariness" may be constitutionally tolerated. The court said only that failure to adjust the apportionment factors to account for a taxpayers activities within and without the

state "*may* result in the taxation of extraterritorial value, and, therefore, *may* run afoul of the fairness principles of the Due Process Clause." 675 A.2d at 89 (emphasis added). Again, this is consistent with the approach of the Pennsylvania Supreme Court.

There does not appear to be any real difference in approach, though outcomes of course may differ depending on the facts, and what each court makes of the record before it. There is no need for further guidance by the Court at this time.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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UNISYS CORPORATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE AND REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

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RULE 29.6 STATEMENT

See Rule 29.6 Statement in the Petition for Certiorari

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition reinforces the need for guidance from this Court on the essential question raised by petitioner: whether a clear mismatch between the constituent elements of a tax base and the constituent elements of an apportionment formula is a fatal structural defect in a state taxing scheme. Indeed, respondent does not dispute the fundamental predicate underlying petitioner's case, namely that Pennsylvania's apportionment regime is structurally flawed. Instead, Respondent's Brief in Opposition simply echoes the opinion of the razor-thin majority below that *even in the face of a theoretically flawed apportionment formula,* a taxpayer must demonstrate "gross distortion" in order to prevail on a constitutional claim. Br. Opp. 7.

Respondent's position simply assumes the answer to the question raised by the Petition, and it does so ignoring this

Court's declaration that "[a]ny formula used must bear a rational relationship, both *on its face* and in its application, to property values connected with the taxing State." *Norfolk & Western Ry v. State Tax Commission,* 390 U.S. 317, 325 (1968) (emphasis added). See also *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 169 (1983): "[T]he factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." As Justice Stevens observed in his dissent in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), "[u]nless the sales, payroll and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause [the taxpayer's] . . . income to be overstated." 445 U.S. at 461 (footnote omitted).

I. QUESTIONS OF FACTUAL DISTORTION AND BURDEN OF PROOF ARE IRRELEVANT

Respondent, like the majority below, takes the position that an apportionment formula violates the Constitution only if the taxpayer can demonstrate that the application of the formula produces a grossly distorted result. Br. Opp. 6-8. The position is premised on cases decided by this Court that evaluated constitutional attacks by reference to whether *the application* of an apportionment formula *on the particular facts of the case* resulted in gross distortion[1]. In those cases, there was no mismatch, as there admittedly is here, between a consolidated tax base reflecting the value of many corporations and the use of the factors of just one of those corporations to apportion the consolidated base. Where, as here, the challenged taxing scheme is asymmetrical and the taxpayer is chal-

[1] The cases are discussed at Pet. 15-16.

lenging the constitutionality of the taxing scheme on its face, the level of distortion is simply beside the point. Whenever there is a dramatic mismatch between the components of the tax base and the components of the apportionment formula, the facial rationality test of *Norfolk & Western* is violated, and the taxing scheme is unconstitutional as a matter of law.

Contrary to respondent's claim, and to the majority's holding below, a taxpayer has no burden of factual proof with respect to the facial validity of the apportionment formula. Its only burden is to prevail on its legal argument, because the inquiry is purely legal. Once that burden is met, as petitioner believes it was here, nothing further is needed. As Justice Nigro stated below in his dissent: "[The] complete absence of the subsidiaries from the apportionment formula makes it facially apparent that the Pennsylvania statute reaches beyond constitutional limits and taxes value outside its borders. . . . I simply cannot agree with this shifting of the burden onto Unisys to formulate a constitutionally valid system of taxation to compare with the Department's facially unconstitutional system." App. 47a. Two other dissenting Justices agreed. App. 54a-55a.

II. RESPONDENT'S CLAIM THAT THERE IS NO STATE COURT CONFLICT IS INCORRECT

Contrary to respondent's assertion, the state courts are divided on the question whether a structural mismatch between the tax base and the apportionment formula constitutes a constitutional violation independent of "gross distortion."

Respondent discusses *E.I. Du Pont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82 (Me. 1996), which upheld an apportionment formula that was revised after the Maine Supreme Court's earlier decision in *Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991). In *Du Pont*, the revised formula contained an overriding limitation on the in-

come tax that could be imposed on a unitary group, based on a calculation of taxable income that used worldwide combined reporting with full factor representation for all members of the group. Thus, the limitation was symmetrical.

Respondent does not discuss *Tambrands*, where the Maine Supreme Court invalidated Maine's structurally infirm apportionment formula on its face because, although the tax base included dividend income from foreign affiliates, the apportionment formula included no part of the property, payroll and sales of the foreign affiliates. 595 A.2d at 1044. The apportionment formula was unconstitutional on its face notwithstanding that only a 14.9% distortion had been demonstrated.

In *American Telephone & Telegraph Co. v. Wisconsin Department of Revenue*, 422 N.W. 2d 629 (Wis. Ct. App. 1988), *review denied*, 428 N.W. 2d 554 (Wis. 1998), the Wisconsin Court of Appeals likewise found a state's apportionment formula unconstitutional on its face because it was structurally flawed. The court framed the issue as follows:

> The question which this case presents is what are the constitutionally sufficient elements of a formula which apportions to the taxing state intangible income paid by its subsidiaries to a taxpayer engaged in a unitary business. This question has not been dealt with authoritatively by the courts.

422 N.W.2d at 635. The Wisconsin court concluded that the apportionment formula "*does not bear a reasonable relation to the corporate activities of the Bell System in Wisconsin*; it apportions to Wisconsin far too much income of the Bell System in relation to its property located here, its sales here or its payroll." 422 N.W.2d at 636 (emphasis added). The "far too much income" statement presumably reflected the fact that the asymmetrical taxing scheme produced an excessive

apportionment in favor of Wisconsin. But the test that was applied was a structural test.[2]

In short, some courts believe an asymmetrical taxing scheme is invalid on its face because it necessarily fails the rational relationship test. Other courts will strike down an asymmetrical scheme only if it produces a grossly distorted result.[3] In the instant case, the majority believed the proper test was gross distortion; the minority believed the asymmetrical scheme was inherently flawed. Conflict and confusion clearly exist. Only this Court can settle the question.

III. RESPONDENT'S DEFENSES HAVE NO MERIT

None of the defenses offered by respondent cures the facial invalidity of Pennsylvania's apportionment formula. The so-called 25% "reduction"[4] fails to cure it. What respondent labels as a "reduction" is merely a step in the calculation of the tax base. It is not limited to taxpayers that apportion and it has no effect on the apportionment formula. Even after the reduction, the tax base still includes 75% of consolidated net worth and the apportionment formula still includes only the parent company's factors.

The option to elect single-factor (rather than three-factor) apportionment is no help because, as the Commonwealth Court below stated, the single-factor formula also produces unconstitutional results. Thus, the Commonwealth Court below correctly concluded: "We agree with Unisys that the

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[2] The Maine and Wisconsin holdings are consistent with the prescient observation of then Judge Cardozo that an inconsistency between the tax base and apportionment fraction violates federal constitutional principles. *People v. Knapp*, 129 N.E. 202, 206 (N.Y. 1920), *rehearing denied*, 132 N.E. 870 (1921), *cert. denied*, 256 U.S. 702 (1921).

[3] See the cases discussed at Pet. 15-16.

[4] The statutory formula to compute the tax base includes 75% of book net worth; hence, the Commonwealth's label of a 25% "reduction." 72 P.S. § 7601 "Capital stock value".

right to choose between two infirm formulas would not cure the deficiency in either." App. 137a, n.5[5]

The availability of statutory "equitable relief" under 72 P.S. § 7401(3)(2)(a)(18) was made irrelevant by the Pennsylvania Supreme Court's holding below that the Subsection (18) analysis is identical to the constitutional analysis. App. at 28a-29a. In other words, in Pennsylvania, statutory relief is available only if constitutional relief is available.

IV. THERE IS A COMPELLING NEED FOR THIS COURT'S GUIDANCE ON THE "FACTOR REPRESENTATION" ISSUE

Wholly apart from the clear conflict among the state courts, there is a compelling need for further guidance from this Court on the mismatch, or "factor representation" issue. Even the majority below acknowledged it was to some extent flying blind in its analysis:

> It is noteworthy, however, that the United States Supreme Court has not fully developed the contours of permissible apportionment as concerns multi-jurisdictional, affiliated corporations. Moreover, the Supreme Court's overall treatment of the guiding principles has been described as lacking concreteness by commentators as well as by the Court itself. Of particular relevance here, the Supreme Court has expressly left open questions concerning the necessity of factor representation in

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[5] In any event, the existence of another, constitutional option should not preclude a taxpayer from relief from the unconstitutional aspects of the option actually exercised. *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71, 78 (1992) ("we do not think that a State can force a taxpayer to conduct its foreign business through a domestic subsidiary in order to avoid discriminatory taxation of foreign commerce.") See also *Conoco, Inc. v. Taxation & Revenue Department*, 931 P.2d 730, 738 (N.M. 1997), *cert. denied*, 521 U.S. 1112 (1997).

apportionment. *See Mobil Oil*, 445 U.S. at 441, n. 15.

App. at 18a-19a.

In arguing that review of the instant case would not have broad implications, the respondent stands alone. The Tax Executives Institute, representing more than 2,800 of the leading corporations in the United States, Canada and Europe, believes otherwise. So do both the Council on State Taxation, representing 540 multi-state corporations involved in interstate and international commerce, and the Pennsylvania Chamber of Business and Industry, with 10,000 members.

In addition, as noted, while following the gross distortion approach, the majority below candidly expressed its concern regarding the uncertainty in this area: "[T]he Supreme Court's overall treatment of the guiding principles has been described as lacking concreteness by commentators as well as by the Court itself." App. at 19a. That is about as clear a request for guidance as one respectful court could make to another.

This case presents a fundamental constitutional question regarding the facial invalidity of a taxing scheme with consolidated elements in the tax base but only parent company factors in the apportionment formula. The Pennsylvania Supreme Court divided 4 to 3 on the issue. Other state courts have taken similarly divergent approaches in similar contexts. This Court should take the opportunity to stem the continuing flow of litigation on this question by granting review and providing the guidance so badly needed.

CONCLUSION

For the foregoing reasons, this Court should issue the Writ of Certiorari.

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 02-1543

UNISYS CORPORATION,

Petitioner,

v.

PENNSYLVANIA BOARD OF FINANCE AND REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioner, Unisys Corporation.[1] Tax Executives Institute, Inc., (hereinafter "TEI" or "the Insti-

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Tax Executives Institute, Inc., has received the written consents of Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

tute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and has approximately 5,300 members who represent more than 2,800 of the leading corporations in the United States, Canada, and Europe. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and other constitutional rights of all business taxpayers. The members of the Institute represent a cross-section of the business community in North America and are, almost without exception, engaged in interstate commerce.

The multijurisdictional companies represented by the Institute's membership are significantly affected by the allocation and apportionment of income and net worth among the various states. As a result, TEI's members will be directly affected by the Supreme Court's decision whether to grant a writ of certiorari in this case. The specific issue involved in this case is whether the franchise tax scheme employed by Pennsylvania, which includes both the net worth and dividends received from subsidiaries of a taxpayer in the tax base, but uses only the taxpayer's property, payroll, and sales in the apportionment formula, results in fair, rational, and constitutional apportionment. The case raises fundamental issues about the legitimacy of a state's apportionment mechanism under the Commerce and Due Process Clauses. A writ of certiorari should be issued here to enable the Court to confirm that the Constitution does not permit apportionment of a consolidated or unitary multistate tax base without taking into account the corresponding apportionment factors of the businesses in the consolidated or unitary group generating the income or value constituting the tax base.

This case has significant ramifications for taxpayers other than Unisys. Its resolution will directly affect the tax liabilities of other businesses subject to Pennsylvania's tax system, and indirectly affect the tax systems of other states that apply similar principles. Indeed, approximately 1,000 cases on appeal in Pennsylvania are awaiting the outcome of this case. As individuals who must contend daily with the interpretation and administration of the nation's tax laws, the Institute's members—and the companies by whom they are employed—have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

1. The issue in this case is whether Pennsylvania can include worldwide income and net worth in the tax base while employing an apportionment formula that includes the apportionment factors of only the parent corporation, *i.e.*, whether "factor representation" is required by the Constitution. This case presents the Court with an opportunity to address an issue that was left open in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980).

2. In computing Pennsylvania's franchise tax for the tax years at issue, Unisys Corporation calculated its tax base with regard to its own net worth and average income, and elected to use a three-factor apportionment formula, taking into account its own payroll, tangible property, and sales for those years. On review, the Pennsylvania Department of Revenue adjusted Unisys Corporation's franchise tax upward substantially by including the aggregate net worth of its hundred-plus subsidiaries worldwide and capitalized dividends received from these subsidiaries into the tax base, but *not* making corresponding adjustments to reflect the property, payroll, and sales of the subsidiaries in the apportionment factors.

3. Under the Commerce Clause and Due Process Clause of the Constitution, a state may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. amend. XIV, § 1 (Due Process Clause).

Dividing income among the several states resembles "slicing a shadow." *Container Corp. v. Franchise Tax Bd.* 463 U.S. 159, 192 (1983). Absolute consistency, even among taxing authorities using the same apportionment formula, "may just be too much to ask," *id.*, but there are constitutional limits on a state's use of an apportionment formula, especially in respect of income derived beyond a state's borders. No state has *carte blanche* in devising or applying its apportionment scheme. The shadow must be sliced, and it must be sliced fairly in accordance with constitutional principles.

4. One means of taxing in-state income is the use of the unitary business principle which calculates the local tax base by first defining the scope of the unitary business of which the taxed enterprise's activities in the taxing state form one part, and then apportioning the total income of the unitary business between the taxing state and other jurisdictions based on a formula taking into account objective measures of the corporation's activities within and without the jurisdiction. *Container Corp.*, 463 U.S. at 165.

To pass constitutional muster, the apportionment formula must, first and foremost, be fair. *Container Corp.*, 463 U.S. at 169. Here, the issue is whether the apportionment formula used by Pennsylvania is properly designed to ensure against the proscribed taxation of extraterritorial income and value. In this case, Pennsylvania included all of Unisys Corporation's dividends from its subsidiaries, as well as their capitalized net worth, in its apportionable tax base. The state, however, did not include in the denominator of the three-factor apportionment formula the property, payroll, and sales of the subsidiaries that produced that income and value.

Thus, Pennsylvania's taxing scheme did not provide for "factor representation" in respect of the net worth of, and dividends received from, Unisys Corporation's subsidiaries.

5. An apportionment formula that fails by design to take into account the factors generating the apportioned income is constitutionally flawed because there can never be a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil,* 445 U.S. at 436. The failure to provide factor representation is "inherently arbitrary," *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), and cannot help but produce a result that reflects neither "a reasonable sense of how [the] income [was] generated" (as required by *Container Corp.*, 463 U.S. at 169) nor "the relative contribution of the activities in the various States to the production of total unitary income" (*Butler Bros. v. McColgan*, 315 U.S. 501, 509 (1942)). This Court's prior holdings teach this conclusion and common sense confirms it.

In *Mobil*, the Court acknowledged that the factor representation issue could be one of constitutional import, but declined to resolve it on the ground that the issue had not been properly raised. 445 U.S. at 434. The Court reserved the question, stating, "we need not, and do not, decide whether combined apportionment of this type [inclusion of the Mobil subsidiaries' and affiliates' sales, payroll, and property in the apportionment formula] is constitutionally required." *Id.* at 441 n.15. This case presents an opportunity to address the issue.

6. Because apportionment methodologies employed in state taxing schemes are only "'rough approximation[s]' of . . . corporate income that [are] 'reasonably related to the activities conducted within the taxing state,'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978), distortion can occur and must be protected against. Indeed, the "gross

distortion" test arose from the Court's recognition that the taxing methodology employed by a state could operate "unreasonably and arbitrarily, in attributing to [a State] a percentage of income out of all appropriate proportion to the business transacted in that state" *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell,* 283 U.S. 123, 135 (1931).

7. *Amicus* TEI submits that the constitutionality of the state taxing scheme does not depend solely on whether a certain mathematical threshold is reached or exceeded. In this case the state did not even undertake to effect a fair result. Rather, the Commonwealth Court of Pennsylvania blithely concluded that the distortion—whatever its magnitude—was insufficient for constitutional relief. Similarly, the Supreme Court of Pennsylvania did not justify the apportionment formula on constitutional grounds but simply demurred the distortion was not sufficient to warrant intervention.

8. Where a state has made *no* effort to account for all the factors producing income or value in its apportionment scheme, whether the distortion is "gross" should not be a threshold question. To hold otherwise is to encourage the states to play a numbers game and insist that—even if inherent, structural distortion can be demonstrated—it is not enough. For Pennsylvania to wave its hand at obvious distortion and eschew an opportunity to remedy it suggests that it is driven less by adherence to constitutional principles than by a desire to maximize revenues. TEI urges this Court to hold that any scheme with fundamental divergence between the source of the elements in the tax base and the source of the factors in the apportionment formula is unconstitutional.

9. A more demanding approach to distortive state tax schemes is justified because Pennsylvania is not alone in refusing to square its tax scheme with the mandates of the Due Process and Commerce Clauses. Taxing authorities in

several other states have reached the same odious conclusion as the Supreme Court of Pennsylvania: Asymmetry between the tax base and the factors used to apportion it is deemed acceptable. Fortunately, some states have come to a more principled conclusion, confirming that the failure to provide factor representation in applying the apportionment rules to unitary businesses contravenes the Due Process and Commerce Clauses.

10. The factor representation issue has been a neglected, rough area in state taxation for more than two decades, with even the courts below commenting on the lack of clear guidance. Without a doubt, Pennsylvania's apportionment formula violates *Container Corp.*'s requirement of fairness: It is externally inconsistent in that it does not represent a reasonable sense of how the income was generated. *See Container Corp.*, 463 U.S. at 169-70. The Court should grant a writ of certiorari in this case to affirm that where a state seeks to apportion a multistate tax base that includes value attributable to multiple corporations in a unitary or consolidated group, the state's apportionment formula must include appropriate amounts of payroll, property, and sales from all such corporations. Only by requiring factor representation can the Court vivify the constitutional requirement of a fair apportionment formula.

ARGUMENT

This case involves the limitations on the state's power to apportion income or value,[2] where the tax base used by the state accounts for income and net worth on a worldwide-consolidated basis. Specifically, the question is whether

[2] Although most case law on fair apportionment involves income taxes, a net-worth tax based on consolidated equity raises the same constitutional concerns as an income tax on consolidated entities.

Pennsylvania can include worldwide income and net worth in the tax base while employing an apportionment formula that includes the apportionment factors of only the parent corporation. Stated simply, the question is whether "factor representation" is required by the Constitution. The answer is yes. This case presents the Court with an opportunity to address an issue that was left open in *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980).

In computing Pennsylvania's franchise tax for tax years ending March 31, 1985, March 31, 1986, and December 31, 1986, Unisys Corporation calculated its tax base with regard to its own net worth and average income, and elected to use a three-factor apportionment formula,[3] taking into account its own payroll, tangible property, and sales for those years.[4]

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[3] A typical "three-factor" formula—similar to the one used by Pennsylvania in this case—compares (i) the taxpayer's property, payroll, and sales (receipts) within the taxing State to (ii) the taxpayer's total property, payroll, and sales. UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT §§ 9-15, 7 U.L.A. 331 (1985, SUPP. 1997). Some jurisdictions use single-factor, double-factor, or weighted-factor formulae to apportion income among the states. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.02 (3d ed. 1998).

[4] Pennsylvania imposes a franchise tax on the capital stock value of every foreign corporation doing business in the state. The tax is based on (i) the consolidated net worth of the taxpayer and its worldwide subsidiaries, and (ii) the taxpayer's capitalized average net income (including dividends from subsidiaries). The statutory formula adds 75 percent of consolidated net worth and capitalized average net income and divides by two. The apportionment formula used to determine Pennsylvania's taxable share of the tax base consists solely of the taxpayer's apportionment factors; no subsidiary apportionment factors are included. 72 P.S. § 7601(a). The multipliers used in the formula, and an alternative apportionment formula based on the taxpayer's assets, are not germane to the argument.

App. 3a, 57a.[5] On review, the Pennsylvania Department of Revenue adjusted Unisys Corporation's franchise tax upward substantially by including the aggregate net worth of its 100-plus subsidiaries worldwide and capitalized dividends received from these subsidiaries into the tax base, but *not* making corresponding adjustments to reflect the property, payroll, and sales of the subsidiaries in the apportionment factors. App. 3-4a, 57-58a. Thus, the Department of Revenue baked a consolidated pie but helped itself to a disproportionately large slice on a separate-entity basis. The constitutional significance of this mismatch between a worldwide-consolidated tax base and a separate-entity apportionment in determining Unisys's Pennsylvania tax is the subject of this case.

Under the Commerce Clause and Due Process Clause of the Constitution, a state may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. amend. XIV, § 1 (Due Process Clause). Such taxation is proscribed because the "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977), and because extra-territorial taxation offends fundamental notions of due process and constitutes an "unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

This Court has rightly observed that dividing income among the several states resembles "slicing a shadow." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 192 (1983). Absolute consistency, even among taxing authorities

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[5] "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *Unisys Corporation v. Pennsylvania Board of Finance and Revenue*, No. 02-1543 (filed Apr. 23, 2003).

using the same apportionment formula, "may just be too much to ask," *id.*, but there are indisputable constitutional limits on a state's use of an apportionment formula, especially in respect of income derived beyond a state's borders.[6] The general permissibility of formulary apportionment should not obscure or minimize the Constitution's limitation on the states' ability to tax out-of-state income; although having discretion, no state has *carte blanche* in devising or applying its apportionment scheme. An apportionment formula may be "imperfect," but it must nevertheless be an "acceptable method of measuring the in-state earnings of an integrated business." *Mobil*, 445 U.S. at 452 (Stevens, J., dissenting). The shadow must be sliced, and it must be sliced fairly in accordance with constitutional principles.

One means of taxing in-state income is the use of the unitary business principle which calculates the local tax base by first defining the scope of the unitary business, of which the taxed enterprise's activities in the taxing state form one part, and then apportioning the total income of the unitary business between the taxing state and other jurisdictions based on a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.[7] *Container Corp.*, 463 U.S. at 165. A balance must be struck between the state's unmistaken need for revenue

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[6] In evaluating challenges to state taxing schemes, the Court examines the practical effect of a challenged tax to determine whether it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[7] Although the terms "allocation" and "apportionment" are often used interchangeably in respect of the division of income among various jurisdictions, "allocation" properly refers to the "attribution of a particular type of income to a designated state, whereas 'apportionment' refers to the division of the tax base by formula." JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *supra*, & 9.01 n.2.

and the taxpayer's legitimate right to protection from overreaching taxing authorities. It is for this Court to ensure that the balance is a reasonable one.[8] If the state has not "given anything for which it can ask return" in respect of the person, property, or transaction it seeks to tax, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940), the Commerce and Due Process Clauses will operate as a constitutional brake upon the state's raw power to tax.

To pass constitutional muster under the Commerce and Due Process Clauses, the apportionment formula must, first and foremost, be fair. *Container Corp.*, 463 U.S. at 169. There must be internal consistency: "[T]he formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* There must also be external consistency: "[T]he factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Id.*

Here, the issue is whether the apportionment formula used by Pennsylvania is properly designed to ensure against the proscribed taxation of extraterritorial income and value. In this case, Pennsylvania included all of Unisys Corporation's dividends from its subsidiaries, as well as their capitalized net worth, in its apportionable tax base. The state, however, refused to include in the three-factor apportionment formula the property, payroll, and sales of the subsidiaries that produced that income and value.[9] Thus, Pennsylvania's taxing scheme did not provide for "factor representation" in

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[8] *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (the Court has a duty "to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers").

[9] The three-factor formula used in this case is set forth in the corporate net income tax provisions and incorporated by reference into the franchise tax provisions. 72 P.S. §§ 7401(3)2.(a)(9)(B), 7602(b), 7603.

respect of the net worth of, and dividends received from, Unisys Corporation's subsidiaries. Consequently, Pennsylvania's take of the tax base is larger than it otherwise should have been, resulting in a distorted tax liability that increased by 90 percent for the tax year ending March 31, 1985, 23 percent for the tax year ending March 31, 1986, and 21 percent for the tax year ending December 31, 1986. During the ten-year period 1984-1994, the average distortion of Unisys's tax liability was 45 percent, and in one year, it exceeded 100 percent. App. 126a, 133a.

Amicus TEI submits that an apportionment formula that fails by design to take into account the factors generating the apportioned income and value is constitutionally flawed because there can never be a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil*, 445 U.S. at 436-37. The failure to provide factor representation is "inherently arbitrary," *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920), and cannot help but produce a result that reflects neither "a reasonable sense of how [the] income [was] generated" (as required by *Container Corp.*, 463 U.S. at 169) nor "the relative contribution of the activities in the various States to the production of total unitary income" (*Butler Bros. v. McColgan*, 315 U.S. 501, 509 (1942)). This Court's prior holdings teach this conclusion and common sense confirms it.

In *Mobil*, the Court acknowledged that the factor representation issue could be one of constitutional import, but declined to resolve it on the ground that the issue had not been properly raised by the taxpayer. 445 U.S. at 434. The Court reserved the question, stating, "we need not, and do not, decide whether combined apportionment of this type [inclusion of the Mobil subsidiaries' and affiliates' sales, payroll, and property in the apportionment formula] is constitutionally required." *Id.* at 441 n.15. *See also id.* at 449 ("[b]ecause the issue has not been presented, we need not,

and do not, decide what the constituent elements of a fair apportionment formula applicable to such income would be"). The reservation of this issue in *Mobil* was specifically acknowledged by the Court in *Container Corp.*, 463 U.S. at 168 n.5. Justice Stevens, however, found the issue dispositive and would have proscribed "lump[ing] huge quantities of investment income that have no special connection with the taxpayer's operations in the taxing State into the tax base" without taking into account the factors that produced that income:

> Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will *inevitably* cause Mobil's Vermont income to be overstated.

445 U.S. at 461 (Stevens, J., dissenting) (emphasis added). *See also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.15[2] (3d ed. 1998) ("If the theoretical predicate for apportioning income from intangibles is that the payor of the intangible income is a subsidiary corporation engaged in a unitary business with the parent-payee, it follows as a matter of principle that the subsidiary-payor's factors should be included in the formula employed to apportion such income.").

Because apportionment methodologies employed in state taxing schemes are admittedly only "'rough approximation[s]' of . . . corporate income that [are] 'reasonably related to the activities conducted within the taxing state,'" *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 223 (1980), *quoting Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978), distortion can occur and must be protected against. Indeed, the "gross distortion" test arose from the Court's recognition that the taxing methodology employed by a state could operate "unreasonably and arbitrarily, in attributing to [a

State] a percentage of income out of all appropriate proportion to the business transacted in that state." *Hans Rees' Sons, Inc. v. North Carolina* ex rel. *Maxwell,* 283 U.S. 123, 135 (1931). The apportionment method invalidated in *Hans Rees* used a single factor based entirely on ownership of tangible personal property and resulted in a distortion of 250 percent. Almost 30 years later, in *Norfolk & W. Rwy. v. State Tax Comm'n*, 390 U.S. 317 (1968), the Court struck down an apportionment method with respect to a Missouri tax on the value of railroad rolling stock, based on the number of miles of track located within the state, where the taxpayer was able to demonstrate a 166-percent distortion. Concededly, the Court has upheld state taxation schemes that have produced distortive results. In *Moorman Mfg.*, Iowa's single-factor formula based on sales was upheld, even though the taxpayer showed a 48-percent difference between in the application of Iowa's single-factor formula and the standard three-factor formula. And the Court minimized the 14-percent distortion in *Container Corp.* as a "far cry" from the distortion extant in *Hans Rees* and insufficient to demonstrate that extraterritorial value was being reached by the state unconstitutionally. 463 U.S. at 183.

Amicus TEI submits, however, that the constitutionality of the state taxing scheme does not depend solely on whether a certain mathematical threshold is reached or exceeded.[10]

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[10] The distortion that Unisys can demonstrate here—an average of 45 percent during a ten-year period compared with the result had the formula reflected subsidiaries' factors—is slightly less than the Court upheld a quarter century ago in *Moorman Mfg.* But the distortion in one year did, and could easily again, exceed 100 percent. Moreover, *Hans Rees*, *Norfolk & W. Rwy.* and *Moorman Mfg.* all dealt with circumstances where the elements of both the tax base and the apportionment formula involved a single company. In *Container Corp.*, a case involving a multinational group of companies, a mismatch between a worldwide-consolidated tax base and a separate-entity apportionment was

More fundamentally, in this case the state did not even undertake to effect a fair result. Rather, the Commonwealth Court of Pennsylvania blithely concluded that the distortion—whatever its magnitude—was insufficient for constitutional relief, though it did direct the application of statutory equitable relief. App. 143a-146a. Similarly, the Supreme Court of Pennsylvania did not justify the apportionment formula on constitutional grounds but simply demurred the distortion was not sufficient to warrant intervention or prevention. Rather than effecting a straightforward, rational alignment of the tax base and the factors generating the tax base, the court concluded corrective action must await a more aggrieved taxpayer.[11]

But why wait? Where a state has made *no* effort to account for all the factors producing income or value in its apportionment scheme, whether the distortion is "gross" should not be a threshold question. To hold otherwise is to encourage the states to play a numbers game and insist that—even if inherent, structural distortion can be demonstrated—it is not enough. For Pennsylvania to wave its hand at obvious distortion in this case and eschew an opportunity to remedy it suggests that it is driven less by adherence to constitutional principles than by a desire to maximize revenues. TEI urges this Court to hold that any scheme with fundamental divergence between the source of the elements in the tax base and the source of the factors in the apportionment formula is unconstitutional.[12] In other words, the constitutional mandate

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not at issue. In sum, these cases addressed the issue of distortion from the apportionment method itself, not the issue of "factor representation."

[11] The court did concede that "Pennsylvania's scheme for taxation of foreign business franchises may be less than ideal and, absent statutory fairness adjustment, unconstitutional in some applications." App. 29a.

[12] To be sure, states need not attain perfection in their apportionment formula, but a threshold based on gross distortion is too high; requiring *gross* distortion in the face of an apportionment methodology that fails in

that the apportionment formula bear a rational relationship, "both on its face and in its application," to values connected with the taxing state, *Norfolk & Western Rwy.*, 390 U.S. at 325, requires more than lip service to the distortion doctrine.

A more demanding approach to distortive state tax schemes is justified because Pennsylvania is not alone in refusing to square its tax scheme with the mandates of the Due Process and Commerce Clauses. Taxing authorities in several other states have reached the same odious conclusion as the Supreme Court of Pennsylvania: Asymmetry between the tax base and the factors used to apportion it is deemed acceptable. *See, e.g., Ashland Pipe Line Co. v. Marx*, 623 So.2d 995, 1004 (Miss. 1993); *NCR Corp. v. South Carolina Tax Comm'n*, 439 S.E.2d 254, 257 (S.C. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Taxation and Revenue Dep't*, 856 P.2d 982, 991 (N.M. App.), *cert. denied*, 857 P.2d 788 (N.M. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Comm'r of Revenue*, 438 N.W.2d 86, 90 (Minn.), *cert. denied*, 493 U.S. 848 (1989); *NCR Corp. v. Comptroller of Treasury*, 544 A.2d 764, 779-81 (Md. 1988).

Fortunately, some states have come to a more principled conclusion. For example, the Maine Supreme Court has forthrightly held that the lack of factor representation is constitutionally fatal:

> [Without factor representation,] [t]he ineluctable result is that more of the business activity of the unitary business is attributed to [the State] than is the actual case. Thus, the income taxable by [the State] under the Assessor's formula does not truly reflect [the corporation's] connection with [the State] and fails to meet the test of fairness required by the due process clause.

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any way to account for the production of income or value undermines the protections against extraterritorial taxation that gave rise to the distortion principle.

Tambrands, Inc. v. State Tax Assessor, 595 A.2d 1039, 1044 (Me. 1991). Five years later, in *E.I. Du Pont de Nemours & Co.* v. *State Tax Assessor*, 675 A.2d 82, 89 (Me. 1996), the Maine court reaffirmed the importance of the factor representation, even while upholding the state's reconstituted statutory apportionment formula:

> We therefore abandon the internal consistency analysis set forth in *Tambrands*. At the same time, we reaffirm the ultimate conclusion in *Tambrands* that the Assessor's *failure to adjust a taxpayer's apportionment factors to reflect the taxpayer's activities both within and without the state of Maine may result in the taxation of extra-territorial value and, therefore, may run afoul of the fairness principles of the Due Process Clause.* Thus, we review the Assessor's Augusta Formula to determine whether it ensures that Du Pont's tax liability "fairly represents" its business activity in the state of Maine consistent with constitutional due process.

E.I. Du Pont de Nemours & Co., 675 A.2d at 89 (emphasis added). Other states, too, have confirmed that the failure to provide factor representation in applying the apportionment rules to unitary businesses contravenes the Due Process and Commerce Clauses. *See, e.g., American Tel. & Tel. Co. v. Wisconsin Dep't of Revenue*, 422 N.W.2d 629, 636 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988) (involving dividends from unitary subsidiaries); *Homart Dev. Co. v. Norberg*, 529 A.2d 115, 121 (R.I. 1987) (involving distributive share from partnership).

The factor representation issue has been a neglected, rough area in state taxation for more than two decades,[13] with even

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[13] Since the Court's decision in *Mobil*, where the issue was reserved, writs of certiorari have been denied in several cases that have raised the factor representation issue. *E.g., Caterpillar Inc. v. New Hampshire Dep't of Revenue*, 741 A.2d 56 (N.H. 1999), *cert. denied*, 529 U.S. 1021 (2000); *Caterpillar Inc. v. Comm'r of Revenue*, 568 N.W.2d 695 (Minn. 1997), *cert. denied*, 522 U.S. 1112 (1998); *NCR Corp. v. South Carolina Tax*

the courts below commenting on the lack of clear guidance. Now is the time to make "the rough places smooth."[14] Now is the time for this Court to settle the issue of factor representation. Without a doubt, Pennsylvania's apportionment formula violates *Container Corp.*'s requirement of fairness: It is externally inconsistent in that it does not represent a reasonable sense of how the income was generated. *See Container Corp.*, 463 U.S. at 169-70; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Court should grant a writ of certiorari to affirm that where a state seeks to apportion a multistate tax base that includes value attributable to multiple corporations in a unitary or consolidated group, the state's apportionment formula must include appropriate amounts of payroll, property, and sales from all such corporations.[15] Only by requiring factor representation can the Court vivify the constitutional requirement of a fair apportionment formula. *Container Corp.*, 463 U.S. at 169.

Comm'n, 439 S.E.2d 254 (S.C. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Taxation and Revenue Dep't*, 856 P.2d 982 (N.M. App.), *cert. denied*, 857 P.2d 788 (N.M. 1993), *cert. denied*, 512 U.S. 1245 (1994); *NCR Corp. v. Comm'r of Revenue*, 438 N.W.2d 86 (Minn.), *cert. denied*, 493 U.S. 848 (1989).

[14] *Isaiah* 40:4b.

[15] *Amicus* TEI does not contend that states are constitutionally required to include any of the income or net worth of a taxpayer's subsidiaries in its tax base. Rather, if states do include this income or net worth, the factors from which it was generated should be reflected in the apportionment formula. Moreover, a state that seeks to include such income or net worth must operate within the confines of *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 80-82 (1992), finding a state's preference for domestic commerce over foreign commerce inconsistent with the Commerce Clause and violative of the Foreign Commerce Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNISYS CORPORATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
BOARD OF FINANCE AND REVENUE,
Respondent.

On Petition for Writ of Certiorari To The Supreme Court of Pennsylvania

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICI CURIAE COUNCIL ON STATE TAXATION AND PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF THE ISSUE

The Council On State Taxation and The Pennsylvania Chamber Of Business And Industry ask this Court to accept this case for review in order to clarify the scope of the "fair apportionment" requirement for state taxes. It is the amici's position that the fair apportionment requirement of the Due Process[1] and Commerce Clauses[2] of the United States

[1] [N]or shall any state deprive any person of . . . property, without due process of law". U.S. CONST. Amend XIV, § 1.

[2] "The Congress shall have power . . . [t]o regulate commerce . . . among the several states". U.S. CONST. Art. I, § 8, cl. 3.

Constitution prohibits a State from using a tax base calculated using one business grouping while dividing that base among the taxing states using another business grouping. Unfortunately, this is exactly what Pennsylvania does by defining its tax base to include values from *both* the taxpayer *and* the taxpayer's subsidiaries, and then dividing that tax base among the taxing states using *only* the taxpayer's (and not the subsidiaries') values. Pennsylvania's business tax system therefore violates the fundamental constitutional concept of fair apportionment.

The Pennsylvania Supreme Court failed to find Pennsylvania's system unconstitutional because of the court's self-admitted confusion over this Court's standards for determining when a tax is fairly apportioned. This case raises the pressing questions of what standard is used to determine the constitutional fairness of a state business activity tax system and whether a state that calculates a tax base on a unitary premise must also calculate the division of such base on the same premise. This case therefore presents an explicit opportunity for this Court to remedy the confusion raised by the Pennsylvania Supreme Court and to prevent other injustices imposed by similar tax systems.

INTEREST OF THE *AMICI CURIAE*

The Council On State Taxation (COST) and The Pennsylvania Chamber Of Business And Industry (Chamber) submit this brief as amici curiae in support of Petitioner in the above-captioned matter.[3]

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[3] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents for the filing of this brief have been obtained from the Petitioner and Respondent and filed with the Clerk of the Court.

COST [4] is a non-profit trade association organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on January 1, 1992, has a membership of over 560 of the nation's largest multistate corporations involved in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of its members and all multi-jurisdictional business entities.

Most of COST's members are engaged in business in the Commonwealth of Pennsylvania and thus are subject to Pennsylvania's unconstitutional calculation if its franchise tax. Thus, these members have a particular interest in this case. Further, all of COST's members are subject to a variety of state taxes that may suffer today or in the future from similar defects. These members have a continuing interest in the availability of a clear and consistent definition of the fair apportionment requirement. COST and its members have consistently asked this Court for further guidance on this issue in the appropriate case. *See e.g., Caterpillar v. The New Hampshire Department of Revenue Administration*, Brief of Amicus Curiae in Support of Pet. for Cert., No. 99-1214 (03/08/00). Therefore, COST and all of its members have an interest in this case and their knowledge can add to the discussion of the issue.

The Chamber is a non-profit corporation devoted to representing the interests of the business community throughout the Commonwealth of Pennsylvania. The Chamber has over 10,000 member corporations, trade associations and local chambers of commerce. The Chambers' members employ more than half of the private workforce in Penn-

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[4] COST was previously the Committee On State Taxation but changed its name to the Council On State Taxation by vote of its membership November 6, 2001.

sylvania. The Chamber strives to provide a competitive business climate for all Pennsylvania companies in an effort to create and maintain jobs in the Commonwealth. Government laws, regulations, and policies that impose undue burdens and additional regulatory requirements on employers dramatically increase the cost of doing business in Pennsylvania and lessen their ability to compete.

The Chamber notes that Pennsylvania is in the midst of a fitful recovery from a sudden recession that hit in late 2000. Like most states, Pennsylvania is faced with higher unemployment rates and enormous budget deficits. To compound an already challenging economic reality, Pennsylvania ranked 47th out of the 50 states in job creation between the years 1992 and 2002. Such a performance during a period of unprecedented growth in the nation places Pennsylvania behind the eight ball in economic recovery. The Chamber and its members find that judicial decisions related to the state's tax climate are often looked to as companies make decisions on whether to expand or locate in the state and it is incumbent upon the courts to assess all of the ramifications of any decision.

OVERVIEW OF STATE BUSINESS ACTIVITY TAX CALCULATION

Every state is allowed to tax only the values of a corporation that are reasonably related to the activity in the state. This concept is embedded in the "fair apportionment" prong of the Due Process and Commerce Clauses' protections. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Unlike the federal government that uses a concept of formal separate geographic or transactional accounting to determine the appropriate taxing jurisdiction and thus the fair apportionment of tax at the international level, each state has adopted a form of formulary apportionment to calculate its share of the business activity tax base of a multistate entity.

Formulary apportionment "rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account object measures of the corporation's activities within and without the jurisdiction." *Container Corp. v. FTB*, 463 U.S. 159, 165 (1983). Formulary apportionment is hence a two-step process. First, a taxpayer calculates its total tax base on a nationwide (and infrequently a worldwide) level. Second, the taxpayer divides that total base among the states according to a statutory formula. That formula varies state by state but typically uses some combination of the ratio of the taxpayer's property, payroll and/or sales in the state to those factors everywhere. Formulary apportionment applies to business activity taxes in every state regardless of the chosen tax base (income, gross receipts, net worth, *etc.*)

In this case, Pennsylvania chose to adopt a tax that sought to tax a business's "value." This tax base includes both the taxpayer's net worth and capitalized income *and* the net worth of the taxpayer's subsidiaries.[5] However, the factors used by Pennsylvania to apportion the taxpayer's total tax

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[5] The Pennsylvania tax base is significantly more complicated than this summary and is fully explained in the Taxpayer's Petition at pp. 3-4. The Taxpayer's case also raises the question as to whether including the taxpayer's dividends received from its subsidiaries in the calculation of its capitalized income without also including the subsidiaries' apportionment factors related to those dividends violates the Due Process and Commerce Clauses. The argument regarding including the dividends from subsidiaries in the tax base calculation—but not the factors generating the income in the apportionment formula—is essentially the same as the argument regarding including the net worth of the subsidiaries in the tax base but not the factors that generated that net worth, and will not be separately stated here.

base between Pennsylvania and all other states where the taxpayer is doing business reflects only the taxpayer's factors, not those related to its subsidiaries. Thus, the subsidiaries' value is included in the tax base but not in the apportionment formula.

REASONS FOR GRANTING THE PETITION

I. THIS COURT IS THE ONLY COURT THAT CAN PROVIDE A NATIONAL, UNIFORM DEFINITION OF THE SCOPE OF THE CONCEPT OF "FAIR APPORTIONMENT".

This Court has declined several times in the past[6] to further expound on the appropriate scope of "fair apportionment" and with time it has become apparent that further exposition is in fact necessary due to states' admitted confusion over the concept. The highest court in Pennsylvania in its own decision in this case has noted that "the [U.S.] Supreme Court has not fully developed the contours of permissible apportionment as concerns multi-jurisdictional, affiliated corporations. Moreover, the Supreme Court's overall treatment of the guiding principles has been described as lacking concreteness by commentators, as well as by the Court itself." *Unisys*, 812 A.2d at 459. This court goes on to note that "[t]he degree to which the [U.S.] Supreme Court intends for external consistency to serve as an additional gauge for theory, as opposed to merely a final check on application of apportionment formulae, is unclear." *Id.* While the Pennsylvania court admitted its confusion, courts in other states have deduced to varying degrees the proper analysis, thus creating

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[6] *See e.g., NCR Corp. v. Commissioner of Revenue*, 438 N.W.2d 86 (Min. 1989), *cert. den.* 493 U.S. 848 (1989); *NCR Corp. v. South Carolina Tax Commission*, 402 S.E.2d 666 (S.C.1991) and 439 S.E. 2d 254 (S.C. 1993), *cert. den.* 114 S. Ct. 2763 (1994); *NCR Corp. v. Taxation and Revenue Department of the State of New Mexico*, 857 P.2d 788 (N.M. App. Ct. 1993), *cert. den.* 114 S. Ct. 2763 (1994).

inconsistent treatment at the state level of this federal constitutional issue. *See Tambrands, Inc. v. State Tax Assessor*, 595 A.2d 1039 (Me. 1991) (including dividends from subsidiaries in tax base but not the factors that generated those dividends in the apportionment formula violated the Due Process clause regardless of the level of actual distortion in the tax), *American Tel. & Tel. Co. v. Wisconsin Dept. of Revenue*, 422 N.W. 2d 629 (Wis. Ct. App. 1988), *review denied*, 428 N.W.2d 554 (Wis. 1988) (same). When one state supreme court asks for guidance and is in direct conflict with the analyses of other state courts, this Court is the only forum available to fill this void.

Additional clarification by this Court of the scope of the "fair apportionment" requirement is necessary because of the limited forums available to taxpayers to pursue a consistent resolution of the issue. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts. U.S. Const. Amend. XI; 28 U.S.C. § 1341. The Eleventh Amendment[7] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state laws. *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 422, 444 (1998). Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy, and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). Thus, taxpayers are usually limited to a state court as the final arbiter of what constitutes "fair apportionment". To

[7] The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state . . . . " U.S. Amend. XI.

ensure that these state courts provide a constitutionally sufficient analysis and to promote consistency among the states in crafting this analysis, COST and the Chamber respectfully request this Court to accept this case for review to provide such guidance.

II. THE ISSUE OF FAIR APPORTIONMENT IS OF FUNDAMENTAL CONCERN TO BUSINESS TAXPAYERS.

Without a doubt, one of the four most pressing constitutional issues confronted by multistate taxpayers, state revenue departments, and state legislatures is the issue involved in this case as to what is considered a "fairly apportioned" tax. [8] Every state relies to some extent on formulary apportionment to calculate its taxable share of the tax base. While most formulary apportionment systems are both standard and non-controversial, some raise serious questions. For example, several states incorporate a concept of "throwback" in which sales into a state in which the taxpayer is protected from tax are included in the numerator of the state of origin. Some taxpayers consider throwback to fail the fair apportionment prong because it taxes extra-territorial values (the sales into other states). Further, the current economic environment is generating some creative tax ideas by legislators and some novel applications of those laws by the state revenue agencies. Many of these changes involve a change to the tax base and/or the definition of a taxpayer but not a concomitant change to the relevant apportionment formulae. Each of these potential but unresolved problems may be subject to prolonged litigation and taxpayers as well as tax authorities have a significant interest

[8] The other issues are also familiar to this Court – the limits on nexus (or jurisdiction to tax); discrimination against interstate commerce; and appropriate remedies for the imposition of an unconstitutional or otherwise invalid state tax.

in reducing this litigation through clarification of the "fair apportionment" standard. At the very least, a decision in this case by this Court will give some basis for consistent application of the standard in the myriad of potential cases rising up through the various state administrative processes now and in the future.

For this reason, COST and the Chamber find it a crucial time to seek further guidance from this Court on the scope of the fair apportionment prong. It is of fundamental relevance to business taxpayers as they struggle to comply but not be disadvantaged by a rapidly changing tax environment.

III. THE STATE COURT IMPROPERLY BROKE THE CONSTITIUTIONAL LINK BETWEEN APPORTIONMENT AND A UNITARY BUSINESS.

A fundamental concept relied upon again and again by this Court is that "the linchpin of apportionability in the field of state taxation is the unitary business principle." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). The unitary business principle defines the scope of the business a state may tax and ignores the geographic and legal limits of such a business. In this case, the taxpayer has stipulated that it and its subsidiaries are part of one unitary business. Pennsylvania requires consolidated reporting of net worth for a taxpayer with investments in other entities and Unisys has raised no object to the consolidation on unitary or other grounds. By failing to first acknowledge the scope of the taxpayer's business activities subject to the Pennsylvania franchise tax, the Pennsylvania court failed to offer support for the only justification for apportioning the values of an interstate business—the unitary nature of that business.[9]

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[9] This is not a case as to whether the state may constitutionally include the subsidiaries at all in the tax base. States retain the ability to choose their tax systems—whether they chose a separate return system, a com-

Once the scope of the business to be apportioned has been defined as unitary, there is no valid excuse for breaking the fundamental link between the unitary business and the means used to apportion such a business.

An example can demonstrate the problems with the Pennsylvania system and the Pennsylvania court's analysis. Suppose that a Pennsylvania taxpayer owns two pieces of property: one located in Pennsylvania and the other located in Connecticut. Each piece of property is worth $100. Assume all of the taxpayer's other factors are equally split between the two states. If the taxpayer owns both parcels outright, the value of the property is included in its tax base and the value is included in its apportionment formula. The resulting tax base is equally split between Pennsylvania and Connecticut. However, if the taxpayer transfers the Connecticut property to a subsidiary, the value of the property is still included in the tax base but will no longer be reflected in the Pennsylvania apportionment formula. Thus, 100% of the taxpayer's property factor will now be in Pennsylvania, thereby increasing the taxpayer's Pennsylvania apportionment percentage, its Pennsylvania tax base, and therefore the ultimate tax. By changing the ownership of the property from the taxpayer to its subsidiary, the taxpayer's tax in Pennsylvania has increased with no fundamental change in its value—the very base the state claims it is taxing. Put another way, if two identical taxpayers have an identical tax base but one owns Connecticut property outright while the other owns the property through subsidiaries, the former will have a lower tax in Pennsylvania than the latter, even though the value of the overall enterprises are identical. The reason for this

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bined reporting system, or a consolidated system such as Pennsylvania is a choice of state law. Once a state chooses a system however, that system must be consistent. Pennsylvania chose a consolidated system to tax the value of a unitary group and that system must be used for the tax base as well as the apportionment factors.

inexplicable result is the inconsistency Pennsylvania creates by defining the tax base under what is at essence a unitary theory but the apportionment factors under a separate legal entity theory. It is this inconsistency that causes the tax difference and this inconsistency that results in the constitutional infirmity.

The Pennsylvania court's error is somewhat understandable. Most of this Court's fair apportionment cases have dealt with an otherwise valid formula's application to a particular set of facts.[10] That is not the issue here. For example, in *Container*, the issue was whether the standard apportionment factor was appropriate for the taxpayer's international business. *Id.* at 180. In that case, the state included the income from both the taxpayer and its affiliates in the tax base and included the apportionment factors from the taxpayer and the affiliates in the apportionment formula. The taxpayer argued that including foreign companies with different profit and wage calculations in the calculation of a domestic tax violated the fair apportionment prong. This Court first noted that the taxpayer was operating a unitary business with its foreign affiliates and that this unitary business was used to determine the tax base *and* the apportionment formula. This Court went on to refuse to invalidate the use of the standard formula in that case because the evidence did "not by itself come close to impeaching the basic rationale behind the three-factor formula." *Id.* at 182. Once the *Container* Court determined that the taxpayer was

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[10] This case is also different than most of this Court's other apportionment cases in that the tax base in this case is the value of the taxpayer, not the net income of the taxpayer. The label that Pennsylvania uses, however, does not negate the practical effect that Pennsylvania is taxing the value of both the parent and its subsidiaries. As this Court once put the matter, a "tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.'" *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991) (quoting Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960)).

part of a unitary business, the statute itself mandated including that unitary business in both the tax base and the apportionment formula. Pennsylvania fails to follow this example and it is there that the problem arises.

This Court should address the inherent mismatch between Pennsylvania's tax base and its apportionment formula. As the linkage between apportionability and the unitary business principle teaches, once Pennsylvania chooses to include a business group in the tax base, it must include that same group in the apportionment formula used to divide that base.

CONCLUSION

For the reasons stated above, and because COST and the Chamber expect this issue to be of continued importance to the state tax community, *amici* respectfully requests the Court to accept this case for review.

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